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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JANET C. MANNING,

Petitioner,

v.

MICHAEL J. ASTRUE, COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit affirmed the district court's decision ordering the payment of an attorney fee awarded pursuant to the Equal Access to Justice Act ("*EAJA*"), 24 *USC* §2412(d)(1)(A), directly to the plaintiff, not plaintiff's counsel.

Two questions are presented:

1. Whether the attorney fee awarded pursuant to the EAJA is to be paid to the attorney who earned the fee by representing the plaintiff in federal court, or to the plaintiff where it can be attached by the government for outstanding debts.

2. Whether the Commissioner's current scheme of payment of the EAJA fee to the plaintiff undermines the principles behind the EAJA, which should be distinguished from and any other fee shifting statutes.

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Pursuant to *Supreme Court Rule* 29.6, petitioner states she is a private citizen and no parent companies or non-wholly owned subsidiaries have any interest in this action.

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OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Manning v. Astrue*, 510 F.3d 1246 (10th Cir. 2007). The Tenth Circuit affirmed the decision of the United States District Court for the Eastern District of Oklahoma rendered on October 27, 2006, is unreported. *See* Appendices A, *infra*, 4a-27a, and B, *infra*, 28a-34a.

STATEMENT OF JURISDICTION

The Tenth Circuit's opinion was rendered on December 20, 2007. (App., *infra*, 4a-27a). A timely filed Petition for Rehearing *En Banc* was denied on February 22, 2008. *See* Appendix C, *infra*, 35a-36a. This Court's jurisdiction is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Equal Access to Justice Act.

Title 28 United States Code, Section 2412(d)(1)(A).

Sec. 2412. Costs and fees.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States

> fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Pursuant to Supreme Court Rule 14.1(f), the provisions of the Social Security Act, Title 42 U.S.C. §§ 405(g) and 406(b)(1)(A) are lengthy and, therefore, set out in Appendices H, *infra*, 55a-57a, and I, *infra*, 58a-59a, respectively. In addition, the Appendix also includes the provisions of the following statutes: Civil Service Act, Title 5 U.S.C. § 7701(g)(1) (Appendix D, *infra*, 37a); Debt Collection Improvement Act of 1996, Title 31 U.S.C. §§ 3716 & 3728 (Appendices E, *infra*, 38a-44a, and F, *infra*, 46a-54a); and the Internal Revenue Code, Title 26, U.S.C. §7430(a)-(d) (Appendix G, *infra*, 46a-54a). Relevant provisions of EAJA's legislative history are set out in Appendix R, *infra*, 88a-103a, pursuant to Supreme Court Rule 14.1(h)(vi).

STATEMENT OF THE CASE

This case raises the important issue of to whom the EAJA attorney fee is to be paid. For almost 28 years, the Commissioner has paid the

EAJA attorney fee to the attorney who earned it by representing a poor Social Security claimant in federal court. This case is not the first case to determine that the attorney fee does not have to be paid to the attorney. *See FDL Techs., Inc. v. United States*, 967 F.2d 1578, 1580-1581 (Fed.Cir. 1992). In that case, the majority relied on the prevailing party language and found no fault with the defendant sending the attorney fee to the bankruptcy trustee rather than to the attorney. *Id.* at 1581. The minority dissent (Newman, J.) explained why they were incorrect to do so. *Id.* at 1582-1586. The Tenth Circuit's decision clearly splits the authority in the circuits. It has recently been joined by the Eleventh Circuit's decision in *Reeves v. Astrue*, ---F.3d---, 2008 WL 1930587 (11th Cir. May 5, 2008). Other circuits who have considered the payment of the attorney fee in EAJA cases, as well as other fee shifting statutes, have reached contrary conclusions.

Of these decisions, the most salient is *Marré v. United States*, 117 F.3d 297 (5th Cir. 1999). The authority of this decision has led the Commissioner to abandon payment of the EAJA attorney fee in the plaintiff's name, and instead pay it directly to the attorney. He has withdrawn his objections that the EAJA fee be payable to the plaintiff, and not to the attorney, because attorney's fees paid under Internal Revenue Code, 26 U.S.C. § 7430(a)-(d) (App., *infra*, 46a-54a), belong to the prevailing party's attorneys and not the prevailing party. *Stephens v. Astrue*, 539 F.Supp.2d 802, 819 (M.D.Md. 2008) citing the Commissioner's motion in *Bell v. Astrue*, Case No.

1:06CV0036-D-A (N.D.Miss. May 30, 2007). (Appendix U, *infra*, 107a). Therefore, the circuits are split on the issue.

Since codification and re-enactment of the EAJA, the Commissioner has made the EAJA payment directly to the attorney. The Commissioner even offered to directly deposit the EAJA attorney fee in the bank chosen by the attorney. (Appendix V, *infra*, 111a). This method of payment was followed despite the so-called plain language of the EAJA statute, now held to be unambiguous and directing that the payment be made to the plaintiff. The Commissioner's past practices are a strong indication that his past practice is due deference, at least *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

The court found the statutory language determined that the EAJA attorney fee should be paid to the plaintiff. (App., *infra*, 12a-15a, 24a). Counsel argues that the court overlooks that

> It is fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should] look to the provision of the whole law and to its object and policy." *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 592, 7 L.Ed.2d 492 (1962), *quoting Mastroplastics Corp. v. N.R.L.B.*, 350

U.S. 270, 285, 76 S.Ct. 349, 359, 100 L.Ed. 309 (1956).

The reason for the EAJA's passage was two-fold. It was to permit the access of poor plaintiffs to the federal court system by placing them on equal footing with the government. *Federal Trade Commission v. Kuykendall*, 466 F.3d 1149, 1156 (10th Cir. 2006). It also serves as a punishment to the government for litigating without substantial justification. *Orner v. Shalala*, 30 F.3d 1307, 1309 (10th Cir. 1994). If the attorney fee is directed to the plaintiff, the purposes behind the EAJA will be thwarted.

The court determined that when a statute is capable of being understood by reasonably well-informed persons in two or more different senses, then it is ambiguous. (App., *infra*, 11a). It is clear that even the Commissioner previously interpreted the EAJA statute differently because he paid the EAJA attorney fee directly to the attorney for years. *Garcia v. Sullivan*, 781 F.Supp. 969, 974 (S.D.N.Y 1991); *Price v. Sullivan*, 756 F.Supp. 400, 405 (E.D.Wisc 1991); *Barringer v. Bowen*, 673 F.Supp. 1167, 1170 (N.D.N.Y. 1987). (App. *infra*, 19a n. 6). One court held it would be "foolish, if not imprudent" to pay an EAJA attorney fee to inmates, just because they were prevailing parties. *Wedra v. Thomas*, 623 F.Supp. 272, 278 (S.D.N.Y. 1985). At the district court level in the case at bar, the Commissioner supported the plaintiff's position that the EAJA fee should be paid to the attorney and not the plaintiff.

(App. *infra*, 24a n. 8).

The court's interpretation of the EAJA statute overlooks that the Commissioner's own rules provide for the payment of the attorney fees to the attorney. HALLEX I-4-1-43 (Appendix Q, *infra*, 87a); HALLEX I-1-2-91 (Appendix P, *infra*, 84a); POMS GN 03930.040 (Appendix T, *infra*, 105a). *See also* SSA's *Policy Handbook* §2019.7. http://www.ssa.gov/ OP home/handbook/handbook.20/handbook-2019.html.[1] (Appendix S, *infra*, 104a). As stated above, the Commissioner's past practices are a strong indication that his past practice is due deference, at least *Skidmore* deference. *Skidmore*, 323 U.S at 140, 65 S.Ct. at 164. *See also McGraw v. Barnhart*, 450 F.3d 493, 500-501 (10th Cir. 2006).

Interpreting the EAJA statute's language in a manner that nullifies its intent leads to a bizarre result. When a literal reading of a statute leads to an absurd result inconsistent with its legislative purpose, this result should be avoided. *Haggar Co. v. Helvering*, 308 U.S. 389, 394, 60 S.Ct. 337, 339, 84 L.Ed. 340 (1940). Payment of the EAJA fee to the plaintiff permits the attachment of the EAJA fee by the government, so the attorney representing the Social Security claimant in federal court may not

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[1] SSA's *Policy Handbook* §2019.7 provides "If a Federal court rules in your favor, under the Equal Access to Justice Act (EAJA), your attorney may request reimbursement of the expenses he or she incurred in representing you. If the court allows a fee and the attorney is awarded a fee under EAJA, the attorney must refund to you the amount of the smaller fee."

receive the EAJA attorney fee. This leads to a result that "is so bizarre that Congress 'could not have intended it.'" *Demarest v. Manspeaker*, 498 U.S. 184, 191, 111 S.Ct. 599, 604, 112 L.Ed.2d 608 (1991), quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982).

It is especially bizarre with respect to the Debt Collection Improvement Act, 31 U.S.C. §3716; 31 C.F.R. §285.5(a)(1). (Appendix O, *infra*, 75a). This case concerns an application for Supplemental Security Income disability benefits pursuant to under Title XVI of the Social Security Act, 42 U.S.C. § 1381a (App., *infra*, 60a). Ironically, the attachment of Supplemental Security Income benefits is expressly forbidden by 31 C.F.R. § 285.5(e)(3)(i)(A), but the EAJA fees are not. (App., *infra,* 83a). Since the EAJA is not expressly cited as unattachable, it may still be reached if the EAJA award is paid to the plaintiff. (App., *infra*, 10a).

There are other unintended consequences of paying the attorney fee to the plaintiff. Plaintiffs with outstanding governmental debts will not easily be able to find competent and capable counsel to appeal their cases in the federal court. The Tenth Circuit dismissed this argument as "purely speculative." (App., *infra*, 22a).

The court "easily conclude[d]" that the plaintiff would rightfully be taxed on the EAJA fees attached in her name. (App., *infra*, 23a). One court has taken

note of this consideration and found it to be unnecessary. *Porter v. U.S.A.I.D.*, 293 F.Supp.2d 152, 157 (D.D.C. 2003). Rather than saddle the plaintiff with a tax liability for the attorney fee award, the court directed the attorney fee award in a Title VII case be paid directly to the attorney. *Id.* The *Porter* court further explained that the prevailing party was the one who authorizes the fee, and

> that the *form* of an attorneys' fee award is that of an award made to the prevailing party, in *substance*, the award is to counsel. In practice, fee applications are invariably prepared by attorneys, supported by attorneys' billing materials and affidavits, calculated according to market data about prevailing attorneys' fees, and evaluated by judges using criteria having little to do with the prevailing parties in the cases before them or with the relationships between the prevailing parties and their attorneys. (Emphasis in original.) *Id.* at 158.

The Seventh Circuit also recognizes that

> whether the motion for fees is in the name of the party or his attorney truly is a "technicality." In such cases, it would "exalt[ ] form over substance" to deny the motion for fees "so that the ministerial function of substituting the plaintiff" for the attorney could be accomplished. *Lowrance v. Hacker*, 966 F.2d 1153, 1156 (7th Cir. 1992), citing *Ceglia*

v. Schweiker, 566 F.Supp. 118, 120 n. 1 (E.D.N.Y. 1983).

There is a potential loss of SSI benefits by a household member if another household member receives an EAJA fee and does pay the fee to the attorney. 20 C.F.R. § 416.1100. (Appendix K, *infra*, 61a). "Income is anything you receive in cash...." 20 C.F.R. § 416.1102. (Appendix L, *infra*, 62a). See App., *infra*, 63a-67a. "Deeming" rules attribute family members' income to Supplemental Security Income recipients. *Florez o/b/o Wallace v. Callahan*, 156 F.3d 438, 442 (2nd Cir. 1998). "[I]t does not matter whether the income of the other person is actually available to you." 20 C.F.R. § 416.1160(a). (Appendix N, *infra*, 68a). Because the income of the entire household is considered, a family member already receiving Supplemental Security Income benefits will lose them due to receipt of a large EAJA award by another family member. An offset appears neutral, but it results in invidious discrimination against a class of disabled debtors. *Maher v. Gagne*, 448 U.S. 122, 125 n. 5, 100 S.Ct. 2570, 2573 n. 5, 134 L.Ed.2d 855 (1980). The government must "remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Tenth Circuit's Decision Creates a Conflict Between the Circuits Regarding to Whom the EAJA Attorney Fee is

Payable.

The decision below creates a direct conflict with the Fifth Circuit Court of Appeals decision in *Marré* at 297. The *Marré* court would not permit the government to set off the attorney fee against the plaintiff's debt to the government and directed that the payment of the attorney fee, pursuant to 26 U.S.C. § 7430 (App., *infra*, 46a-54a), should be directly to the attorney. *Marré* at 303-305. The Marré decision is recognized by the Commissioner in the Fifth Circuit as controlling on the issue of to whom the attorney fee is to be paid. The Marré decision relied heavily on a fee shifting statute under the Truth-In-Lending Act where the attorney fee was directed to the attorney rather than be allowed to become an asset of the defendant, which would have occurred if not paid directly to the attorney. *See Plant v. Blazer Financial Services, Inc.*, 598 F.2d 1357, 1365 (5th Cir. 1979); *Carr v. Blazer Financial Services, Inc.*, 598 F.2d 1368, 1370 (5th Cir. 1979). In *Plant* and *Carr*, the court was interested in promoting the concept of multiple attorneys general to prevent abuse under the Act. This Court has noted role of a plaintiff being akin to a private "attorney general" in advancing the cause of righting government wrongs and punishing the government for assuming an unjustified legal position. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). The *Marré* decision is also in harmony with *Miller*, which determined the fee is to be paid directly to counsel so the award does not enrich litigants, but actually

compensates attorneys for the legal services performed. *Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539 (5th Cir. 1970).

This Court has affirmed lower courts' award of attorney fees to counsel for plaintiff in a civil rights case. *Maher v. Gagne*, 448 U.S. at 126-127, 100 S.Ct. at 2573. This case was decided before the EAJA became law, but it would seem that if the Court were dissatisfied with the results of an award of attorney fees made to the attorney, then it would have so stated at that time.

Other circuit courts have also determined that the proper recipient of the attorney fee in a fee-shifting statute, which permits the prevailing party to apply for an attorney fee, is the attorney and not the plaintiff.

The Third Circuit has awarded the attorney fee to the attorney in two pre-EAJA cases. Payment was made to the attorney in order to avoid a windfall to the plaintiff. *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978). Payment was also made to the attorney in order to avoid a windfall to the defendant, which would be against public policy. *Shadis v. Beal*, 692 F.2d 924, 928 (3rd Cir. 1982).

The Sixth Circuit has also determined that, although the EAJA fee is to be applied for in the name of the plaintiff, it is paid to the attorney. *King v. Commissioner of Social Sec.*, 230 Fed.Appx 476 (6th

Cir. 2007). The court did not address this case. "[A]ttorney fees awarded under the EAJA are *payable to the attorney*; they are awarded for the benefit of the party, but the money is not the party's to keep." (Emphasis added.). *King* at 481. *King* cites other Sixth Circuit cases that made the attorneys' fee payable to the attorney and not the plaintiff. *Martin v. Commissioner of Social Sec. Admin.*, 82 Fed.Appx. 453, 456 (6th Cir. 2003); *Willis v. Sullivan*, 931 F.2d 390, 394 (6th Cir. 1991); *Hull v. Bowen*, 748 F.Supp. 514, 526 (N.D. Ohio 1990); *Giarda v. Sec'y Health & Human Servs.*, 729 F.Supp. 572, 575 (N.D.Ohio 1989). The court also did not reference these decisions.

The Seventh Circuit is also in accord that the attorney fee is payable to the attorney. "Technically, the award of fees...is to the party, not his lawyer, but it is common to make the award directly to the lawyer where, as in this case, the lawyer's contractual entitlement is uncontested." *Richard v. Penfold*, 900 F.2d 116, 117 (7th Cir. 1990). While the court notes this case (App., *infra*, 21a-22a n. 7), it does not distinguish it or even note that the case is in direct opposition to its decision, which results in a split in the circuits.

Although *Davidson* was unpublished and is not of precedential value, the court ignored the rationale explaining why the fee should be paid to the attorney because it

> perceived a potential for unfairness if the

> client refused to endorse a check over to [the attorney]. To make an EAJA fee award payable to counsel is not inimical to the EAJA's purpose. Prosecution of a successful EAJA claim unquestionably benefits the client by reducing the cost of legal services. However, an attorney might lack the incentive to bring the EAJA motion if he knew that the award would be payable to a client who might then refuse to turn over any portion of that payment. Where, as here, the potential EAJA award is larger than the award of fees under SSA § 406(b)(1), the attorney would not have the incentive to bring the EAJA motion unless he was assured of receiving the excess of EAJA fees over SSA fees. If the client received the larger award, and refused to pay the attorney the difference between the two awards, the client would receive something of a windfall, while the attorney would be undercompensated for his work. *Davidson v. Sullivan*, 1992 WL 368014 *3 (N.D.Ill. 1992).

In another Seventh Circuit case decided before EAJA was enacted, the attorney fee was paid to the legal services organization which "stands in the same position as a private attorney to whom a fee is owed," in order to avoid a windfall to the plaintiff." *Hairston v. R. R. Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975). *See also Grand Boulevard Improvement Ass'n v. City of Chicago*, 553 F.Supp. 1154, 1169 (N.D.Ill. 1982).

The Eighth Circuit found that a plaintiff represented by *pro bono* counsel had not incurred an attorney fee. The fee was directed to counsel rather than the prevailing party in order "to diminish the deterrent effect of the expense involved in seeking review of, or defending against, unreasonable government action." *Cornella v. Schweiker*, 728 F.2d 978, 981 (8th Cir. 1984).

The Ninth Circuit has also directed the attorney fee to the attorney to prevent a windfall to the plaintiff. *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974). It has also ruled the fee is payable to the attorney who is in the position of a private attorney. *Dennis v. Chang*, 611 F.2d 1302, 1309 (9th Cir. 1980). These cases were ignored while the court distinguished other rulings by the Ninth Circuit directing the payment to counsel rather than to plaintiff. *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equipment, Inc.*, 89 F.3d 574, 577 (9th Cir. 1996), *cert. denied sub nom U.S. ex rel. Virani v. Hall & Phillips*, 519 U.S. 1109, 117 S.Ct. 945, 136 L.Ed.2d 834 (1997) was distinguished by the court because of the difference between a qui tam case and a civil rights case. *See* App., *infra*, 18a, citing *Gilbrook v. City of Westminster*, 177 F.3d 839, 874 (9th Cir. 1999). Despite these differences, the attorney was awarded the attorney fee.

The Tenth Circuit has previously directed that the EAJA fee be paid to the attorney. "The government has been ordered to pay appellant's counsel fees and costs pursuant to the EAJA."

Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir. 1986). *Weakley* unambiguously ordered "any additional [EAJA] fees be awarded directly to Appellant's attorney." *Weakley* at 580. "Thus, the Attorney will receive both the award under the EAJA and the award under the Social Security Act." *Kemp v. Bowen*, 822 F.2d 966, 968 (10th Cir. 1987), quoting *Weakley* at 580. *McGraw* also contemplates the attorney receiving the fee because it mandates payment of the smaller of the EAJA attorney fee and the 42 U.S.C. § 406(b) attorney fee be paid to the plaintiff. *McGraw* at 497 n. 2. However, the court distinguished *Weakley* as not addressing "whether the Social Security claimant or the claimant's attorney was entitled to recover the fees under the EAJA statute." (App., *infra*, 21a). Pursuant to *McGraw*, the court found that the EAJA award was to the claimant, whereas the § 406(b) award is to counsel. (App., *infra*, 21a).

The Eleventh Circuit has previously determined that it is proper to pay the attorney fee directly to the attorney because "any other method of payment would be impractical." *Turner v. Air Force*, 944 F.2d 804, 808 n. 4 (11th Cir. 1991). The attorney in *Turner* had been a salaried employee of one of the plaintiffs and had applied for all of the attorney fees even though he was no longer employed by them. *Turner* at 808. The Tenth Circuit ignored the fact that the attorney was awarded a portion of his fee for representation of one of the claimants. *Id.* at 806. The court selectively quoted *Turner*. (App., *infra*, 14a). It ignored that the attorney fees were paid to

the attorney, and that it was impractical to do otherwise. It noted only the cited passage that the fee belongs to the prevailing party. The recent Eleventh Circuit decision in *Reeves* does not cite this case. *Reeves* at *1.

The Federal Circuit has ordered the attorney fee paid to counsel or the service organizations employing them in order to prevent a windfall to the plaintiff. *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1037 (Fed.Cir. 1974), rev'd on other grounds *sub nom Aleyska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In *Willis*, the Federal Circuit also agreed with the Ninth Circuit's reasoning in *Virani* at 577 and *Pony v. County of LA*, 433 F.3d 1138, 1142-1143 (9th Cir. 2006), that the attorney has the right to collect the fees awarded because the right to the fee vests in the attorney when the plaintiff requests the attorney fee award provided for by the statute. *Willis v. Government Accountability Office*, 448 F.3d 1341, 1347 n. 4 (Fed.Cir. 2006), *rehearing en banc denied, cert denied*, ---U.S.---, 127 S.Ct. 1356, 167 L.Ed.2d 76 (2007). The *Willis* court found nothing inharmonious with their decision that the attorney was to be awarded the full statutory fee award even though the plaintiff had already paid him a part of the attorney fees. *Id., citing Jensen v. Department of Transportation*, 858 F.2d 721, 724 (Fed.Cir. 1988).

II. The Issue Presented by the Conflict is Recurring and of Great Practical Importance.

Allowing plaintiff as the prevailing party to apply for the EAJA attorney fee, but paying the fee directly to the attorney is practical and logical. This is especially true in the context of a Social Security case, when the plaintiffs are usually impoverished, in debt, and judgment proof. While the EAJA statute, as well as other fee shifting statutes, uses the term "prevailing party," the reason for the statute is to allow impoverished plaintiffs to have access to the federal courts. The current scheme devised by the Commissioner undermines the entire reasoning and purpose of the statute when it permits the attachment of the EAJA attorney fee to satisfy outstanding debts owed by the plaintiff. Now, a whole class of individuals, those with outstanding debts owed to the government, will be segregated from those without debts and unable to obtain counsel to represent them in federal court. At least one justice of this Court has voiced concern that the pool of competent lawyers could shrink, *infra*. *City of Burlington v. Dague*, 505 U.S. 557, 574-575, 112 S.Ct. 2638, 2648, 120 L.Ed.2d 449 (1992) (Blackmun, J., dissenting). Overlooked is that Justice Blackmun discussed the fee awards as though the prevailing party and attorney were one.

> Preventing attorneys who bring actions under fee-shifting statutes from receiving fully compensatory fees will harm far more than the legal profession. Congress intended the fee-shifting statutes to serve as an integral enforcement mechanism in a variety of federal

> statutes-most notably, civil rights and environmental statutes. The *amicus* briefs filed in this case make clear that we can expect many meritorious actions will not be filed, or, if filed, will be prosecuted by less experienced and able counsel. Today's decision weakens the protections we afford important federal rights. (Footnote deleted.). *Id.*, 505 U.S. at 574-575, 112 S.Ct. at 2648.

III. The Decision Below is Based on "Prevailing Party" Language Applied in Unique Circumstances where the Attorney has no Standing to Receive the Attorney Fee or in Fee Shifting Statutes where the Attorney Fee Is a Part of the Remedy.

There are cases in which a plaintiff's attorney has withdrawn, been fired, or been removed from the case by the court for disciplinary reasons. After resolution of the case, the attorney then applied for an attorneys' fee and was denied because he did not have standing to request the fee. A small sampling includes *Panola Land Buying Association v. Clark*, 844 F.2d 1504, 1506 (11th Cir. 1988); *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227 (10th Cir. 1998), *cert. denied*, 525 U.S. 1019, 119 S.Ct. 546, 142 L.Ed.2d 454 (1998), *rehearing denied*, 525 U.S. 1117, 119 S.Ct. 894, 142 L.Ed.2d 792 (1999); *Weeks v. Independent School District No. I-89*, 230 F.3d 1201 (10th Cir. 2000), *cert. denied*, 532 U.S. 1020, 121 S.Ct. 1959, 149 L.Ed.2d 755 (2001). In these cases, the

attorney-client bond had been severed. The cases rely heavily on the fee being for the prevailing party rather than having the fee paid to an attorney who no longer represents the plaintiff. The cases are readily distinguishable from the case at bar because the facts are so different. Counsel has not been fired or removed from the case. Counsel does not argue that an attorney who no longer represents the prevailing party has any standing to seek an attorney fee. The is a fact pattern similar to that of *Willis* at 1347. Plaintiff attorneys have no independent right to seek EAJA fees. *Oguachuba v. I.N.S.*, 706 F.2d 93, 97-98 (2nd Cir. 1983).

The prevailing party language has also been applied in Civil Rights cases where attorney fees may be awarded. *Venegas* used the phrase "prevailing party." *Venegas v. Mitchell*, 495 U.S. 82, 87, 110 S.Ct. 1679, 1682, 109 L.Ed.2d 74 (1990). The attorney, Mitchell, had been replaced as the attorney in the case, and brought his action as an intervenor. *Id.*, 495 U.S. at 85, 110 S.Ct. at 1681. He had no standing to obtain a fee. This result is similar to that of *Willis*, which interprets the fee shifting statute in the Civil Service Reform Act, 5 U.S.C. § 7701(g). (App., *infra*, 37a). *Willis* at 1344-1346. *Venegas* was a civil rights case, considering a fee shifting statute pursuant to 42 U.S.C. § 1988. In a Civil rights case, the relationship of the attorney to the client is entirely different from the case at bar. The holding in *Venegas* would indicate that all fee shifting statutes cannot be interpreted exactly alike, because the EAJA does not permit the attorney to

contract for more than the statutory amount of the EAJA fee permitted. *Venegas*, 495 U.S. at 82, 110 S.Ct. at 1679. Petitioner notes that this result would be anomalous with Social Security regulations that carefully regulate the amount of fees to be requested and paid. 42 U.S.C § 406(b)(1)(A). (App., *infra*, 58a).

Jeff D. is another civil rights case utilizing the prevailing party language. *Evans v. Jeff D*, 475 U.S. 717, 730, 106 S.Ct. 1531, 1539, 89 L.Ed.2d 747 (1986). This case stands for the proposition that the plaintiff can waive attorney fees in order to settle the case. *Id.*, 475 U.S. at 731, 106 S.Ct. at 1529-1530. In civil rights cases, the attorney fee is a part of the remedy a plaintiff can seek. Under the EAJA, there is no provision permitting a claimant to waive an attorney fee as a part of the remedy in the case. There is not even authority for the plaintiff to assign the attorney fee to his attorney. *Winslow v. Astrue*, 2008 WL 724374 *1 (10th Cir. 2008).

IV. The Court is Uniquely Positioned to Clarify the Uncertainty in the Interpretation of the EAJA Statute.

Although there is considerable confusion over the meaning of the EAJA statute, there is no confusion regarding its purpose. "The purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable government actions. *Sullivan v. Hudson*, 490 U.S. 877, 883, 109 S.Ct. 2248, 2253, 104 L.Ed.2d 941 (1989). The Court further stated that

> [t]he EAJA applies to a wide range of awards in which the cost of litigating fee disputes would equal or exceed the cost of litigating the merits of the claim. If the Government could impose the cost of fee litigation on prevailing parties by asserting a "substantially justified" defense to fee applications, the financial deterrent that the EAJA aims to eliminate would be resurrected. The Government's general interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights and "curbing excessive regulation and the unreasonable exercise of Government authority." *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 163-165, 110 S.Ct. 2316, 2322, 110 L.Ed.2d 134 (1990).

The Commissioner's scheme, currently, is to pass the costs of §405(g) litigation onto the plaintiff under the rubric of making EAJA attorney fee attachable through application of the Treasury Department's regulations, which implement the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3716. (App., *infra*, 38a-44a). Treasury Department regulations do not allow the government to offset attorney fees to collect Plaintiff's debts. Although fee payments under fee-shifting statutes are not excluded from offset, 31 C.F.R. §§ 285.5(e)(1) & (e)(2) make it clear plaintiffs would, at best, be treated as a representative payee. (App., *infra*, 81a-82a). This is why the Commissioner now insists that the EAJA fee

be paid to the plaintiff, so the funds are attachable. The Treasury Offset Program defines a "Representative Payee" as "a person named as payee on the payment voucher certified by the payment agency who is acting on behalf of a person entitled to receive the benefit of all or part of the payment." 31 C.F.R. §285.5(b)(5). (App., *infra*, 80a). Payments to representative payees may not be offset to repay the representatives payee's debts. 31 C.F.R. § 285.5(e)(5). (App., *infra*, 83a). The government can offset only the attorney's federal debts, not the clients.

No reasoned analysis has been supplied for the Government's change in policy and practice on EAJA fee payments, which did not commence until this case reached the Tenth Circuit.[2] (App., *infra*, 24a). The historical interpretation of the EAJA statute is now suddenly passé because it has been replaced with an interpretation that no longer permits the award be made to the attorney. When statutes are ambiguous, other tools must be used to divine their interpretation. *McGraw* at 498; *Schusterman v. U.S.*, 63 F.3d 986, 989 (10th Cir. 1995).

The Tenth Circuit opined that "Congress knows what language to use to award attorney's fees

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[2] The fact that the Commissioner has only recently commenced its new fee accrual policy herein more than 2 decades after *Jeff D.* demonstrates that he does not believe that *Jeff D.* controls the policy. Indeed, despite *Jeff D.*, he has chosen an inconsistent approach, supporting fee awards to counsel in all cases in the 5th Circuit because of *Marré* at 304. Thus, if *Jeff D.* controlled, the Commissioner would be required to follow it.

to an attorney and what language to use when it chooses to award the fees to the prevailing party." (App., *infra*, 17a). Ignored is that the government has only recently had the ability to match EAJA recipients to past governmental debts. *Stephens* at 809-810. When Congress passed the Debt Collection Improvement Act, no matching capacity existed under the Treasury Offset Program to compare taxpayer numbers with debt records. 31 C.F.R. §§ 285.5(b) & (c)(2). (App., *infra*, 76a-81a). Congress knew that the EAJA fee was paid to the attorney rather than the plaintiff, pursuant to the Commissioner's policies cited, *supra*. There was no reason for Congress to anticipate that the policy would change.

V. The Decision Below Is Incorrect.

Paying the EAJA fee to Plaintiff directly subverts EAJA's entire legislative purpose because poor claimants with an outstanding school loan are unlikely to find representation. The decision sequesters this class of individuals from access to the courts. The court cites *Evans v. Jeff D.*, 475 U.S. at 741 n. 34, 106 S.Ct. at 1531 n. 34, that the possibility was "remote." (App., *infra*, 22a-23a). EAJA insures "a strong incentive to represent indigent social security claimants.... [R]educing access to the judiciary for indigent individuals...does not further the goals of the EAJA." *Cornella* at 986-987. The court has specifically noted if unrewarded for their labors, it "might tend to discourage attorneys from undertaking to represent claimants in such cases."

McGraw at 502.

When Congress re-enacted the EAJA in 1985, the uncodified *Savings Provision*[3] demonstrated Congressional intent that counsel receives the EAJA fee, so a broader reading of the legislative history is appropriate. (App., *infra*, 88a-103a). *See McGraw* at 500. EAJA's legislative history cautions against an "overly technical construction" of its terms. *Brewer v. American Battle Monuments Comm.*, 814 F.2d 1564, 1566-1567 (Fed.Cir. 1987), citing H.R.Rep. No. 120, 99th Cong., 1st Sess., 18 n. 26, *reprinted* 1985 U.S.C.C.A.N. 132, 146 n.26. (App., *infra*, 88a, 99a). *Weakley* embodies the dictates of the *Savings Provision*, which states the attorney will receive the EAJA because the directive to refund implies the fee be paid to the attorney. *Weakley* at 580. One section of the EAJA cannot be interpreted in isolation so it renders another section meaningless. The court's decision renders EAJA's *Savings Provision* surplusage, contrary to *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115, 11 Otto 112, 25 L.Ed. 782 (1879) ("no clause, sentence or word shall be superfluous, void, or insignificant.").

Even the Tenth Circuit court did not appear to have faith in its own determination.

> [W]e recognize that perhaps the answer is not as clear as it would appear from the statutory language, legislative history and case law.

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[3] Pub.L. 99-80, 99 Stat. 183.

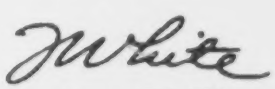
> Admittedly, it seems counter intuitive to hold that an award of attorney fee does not go to the attorney, especially since the EAJA fees are calculated based on the time spent by the attorney and based on the attorney's hourly rate, *see* 28 U.S.C. § 2412(d)(1)(B), (2)(A). Indeed, the answer to the question "who do the fees go to" was not clear to the government, because it switched positions during the course of this investigation. But on appeal, it took the position that the award belonged to Ms. Manning. Despite the government's confusion, we are bound by the statutory language, legislative history, and case law, which has been set forth in detail above. (Footnote omitted.) (App., *infra* 23a-24a).

The Tenth Circuit's decision clearly splits the authority in the other circuits. It results in a bizarre outcome that thwarts the purpose of the EAJA by chilling the poor Social Security debtor's access to the courts to appeal their disability cases.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,



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United States Court of Appeals
Tenth Circuit.

Janet C. MANNING,
Plaintiff–Appellant,

v. **No. 06-7127**

Michael J. ASTRUE,* Commissioner,
Social Security Administration,
Defendant–Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA
(D.C. No. 04-CV-21-SPS)

December 20, 2007

Submitted on the briefs: **

Richmond J. Brownson, Timothy M. White, Tulsa, OK, for Plaintiff–Appellant.

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* Pursuant to Fed. R. App. P. 43(c)(2), Michael J. Astrue is substituted for Jo Anne B. Barnhart as appellee in this appeal.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App.P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Peter D. Keisler, Assistant Attorney General; William Kanter, Michael E. Robinson, Attorneys, Appellate Staff, Civil Division, Department of Justice, Washington, D.C. (Sheldon J. Sperling, United States Attorney, Muskogee, OK, of Counsel) for Defendant–Appellee.

Before **HENRY** and **ANDERSON**, Circuit Judges, and **BRORBY**, Senior Circuit Judge.

ANDERSON, Circuit Judge.

Janet C. Manning appeals the district court's denial of a Fed.R.Civ.P. 60 motion requesting that the court either set aside an administrative offset to an award of attorney's fees the court made to her under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), or, alternatively, amend the fee order to award the EAJA fees to her counsel. The very narrow issues before us on appeal are (1) whether the EAJA attorney's fees award should have been paid to Ms. Manning or to her attorney in the first instance and (2) if the fees were properly paid to Ms. Manning, are those fees subject to administrative offset under the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3716, for student loan debts owed by Ms. Manning to the United States Department of Education. Because we conclude the district court properly made the attorney's fees award to Ms. Manning and that

award was subject to administrative offset for her unpaid student loan debts, we affirm.

BACKGROUND

The district court[1] reversed the Commissioner's denial of supplemental security income (SSI) benefits to Ms. Manning and remanded for further proceedings. Ms. Manning then moved in that court for an award of attorney's fees to her counsel of $5,958.30 under the EAJA. The Commissioner did not object, and the district court awarded the fees, ordering payment to Ms. Manning as the prevailing party. In addition, the court ordered that if Ms. Manning's attorney were awarded any fees pursuant to 42 U.S.C. § 406(b)(1), which permits payment of fees to an attorney out of past due benefits, the attorney must refund the smaller amount to her pursuant to *Weakley v. Bowen,* 803 F.2d 575, 580 (10th Cir.1986).

Thereafter, the Social Security Office of the General Counsel notified Ms. Mannings' attorney that the district court had ordered the Social Security Administration to pay attorney's fees in the amount of $5,958.30 under the EAJA and that he would "soon receive a check payable to Janet C. Manning and Timothy White and Associates c/o Richmond Brownson, in accordance with the [district court's order]." Aplt.App. at 58. Counsel, however,

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[1] The parties agreed that the magistrate judge would conduct all proceedings in this case. Thus, we refer to the proceedings before and the decision of the magistrate judge as before and by the district court.

received a United States treasury check made payable to "Janet Manning c/o Timothy White & Associates" in the amount of $3,992.18. *Id.* at 59. Under the authority of the Debt Collection Improvement Act of 1996, the United States had administratively offset the EAJA award by $1,966.12, an amount Ms. Manning owed to the United States Department of Education on an outstanding school loan debt.[2]

Ms. Manning's counsel then moved the district court, on his own behalf, either to set aside the alleged wrongful administrative offset or to correct, under Fed.R.Civ.P. 60(a), the alleged clerical error of awarding attorney's fees directly to Ms. Manning rather than to her attorney. Aplt.App. at 38. Counsel argued that the offset should be set aside because (1) EAJA fees are income to counsel; (2) the Debt Collection Improvement Act permits administrative offset from disability benefits, but does not specifically mention administrative offset from EAJA fees; (3) counsel has a de facto lien against the fees that should receive priority over any claim by the government; and (4) under *Weakley,* 803 F.2d at 580, if a claimant later receives disability benefits resulting in the claimant's attorney being awarded fees under § 406(b)(1), then the attorney must refund the smaller of the EAJA or the § 406(b)(1) fees to the claimant, thereby suggesting that the intent of the EAJA is to compensate counsel.

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[2] Ms. Manning has never disputed having an unpaid student loan debt.

In addition to filing the motion, counsel contacted the Department of Education to resolve this matter administratively. The Department initially indicated that it was in the process of refunding the offset monies. Aplt.App. at 63. Later, however, the Department changed course and determined it would not refund the offset. After efforts to resolve the matter administratively failed, the Commissioner stipulated that the district court's order should be corrected to award attorney's fees to Ms. Manning's attorney. The court declined to honor the stipulation, however. The court first decided that the motion should have been made pursuant to Rule 60(b)(1), rather than Rule 60(a), because there was no clerical error as the court had intended to award attorney's fees to Ms. Manning, the prevailing party, and not to her attorney. Construing the motion as filed under Rule 60(b)(1), the court denied relief, finding that under the clear language of 28 U.S.C. § 2412(d)(1)(A), the EAJA payment was properly made to Ms. Manning, the prevailing party, and not to her attorney. The court reasoned that to ignore the clear statutory language and to award fees directly to Ms. Manning's attorney to circumvent the offset would

> summarily decide [unresolved] disputes not properly before the Court: (i) whether the United States may legally assert an offset against fees awarded to the Plaintiff under the EAJA; (ii) whether the Plaintiff's attorney has an enforceable lien on the EAJA fee award arising out of his contract with the Plaintiff;

> and, (iii) whether any attorney's lien has priority over the government's right of offset.

Aplt App. at 76–77 (citation omitted). Ms. Manning appealed.

ANALYSIS

I. What is the Scope of this Appeal?

In this section, we set forth the issues that are the basis for this appeal and discuss why we are not addressing other issues raised on appeal by Ms. Manning. As indicated above, we confine our disposition to the following two issues: (1) whether attorney's fees under the EAJA are payable to Ms. Manning or to her attorney and (2) if the attorney's fees are payable to Ms. Manning, whether the fees may be offset under the Debt Collection Improvement Act for an outstanding student loan debt owed by Ms. Manning to the Department of Education. The first issue was raised in the district court by Ms. Manning and later by her counsel on his own behalf and by his own motion. The district court, as indicated above, addressed this issue, ruling on it adversely to counsel. The second issue was not ruled on by the district court. Ms. Manning raises the issue on appeal, however, and the Commissioner responds, arguing that any EAJA award to Ms. Manning is subject to offset. While technically we could avoid deciding this issue because it was not ruled on by the district court, we choose to consider it for two reasons: (1) because the district court held that the fee award was to Ms.

Manning as the prevailing party, the court effectively held that the debt could be offset and (2) the first and second issues are intertwined, making it advisable to address the second issue.

Ms. Manning also argues on appeal that counsel "probably" has an enforceable lien on the EAJA fee award with priority over the government. Aplt. Br. at 26. This argument was not adequately raised or briefed in the district court and was not ruled on by that court. Due to the insufficient development in the district court, the lack of an adequate record on appeal, and the lack of a district court ruling, we do not address any issue concerning an attorney's lien. Specifically, we decline to address whether an attorney's lien attached to the award of attorney's fees; if a lien attached, how that lien attached; how to enforce an attached attorney's lien; how to collect on the attorney's lien; or whether a lien would have priority.[3]

II. Are the EAJA Attorney's Fees Payable to Ms. Manning or to Her Attorney?

Ms. Manning does not dispute the district court's finding that her motion was properly filed under Rule 60(b). We review the denial of Rule 60(b) relief for an abuse of discretion. *See Zurich N. Am. v.*

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[3] Also, any debts other than student loans are not part of this appeal. For example, we do not address any questions concerning unpaid child support payments or creditors' rights in intervening bankruptcy actions. The resolution of these issues must be addressed when they arise in an appropriate case with a proper record.

Matrix Serv., Inc., 426 F.3d 1281, 1289 (10th Cir.2005). Under Rule 60(b)(1), a court may relieve a party from an order based on "mistake, inadvertence, surprise, or excusable neglect." Fed.R.Civ.P. 60(b)(1). A "mistake" may occur if the district court made a substantive mistake of law in its order. *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir.1999).

Applying these standards, we conclude that there was no mistake warranting Rule 60(b)(1) relief, and, therefore, the district court did not abuse its discretion in denying Ms. Manning's motion. In reaching this conclusion, we first look to the EAJA statute.

> When interpreting the language of a statute, the starting point is always the language of the statute itself. If the language is clear and unambiguous, the plain meaning of the statute controls. A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses.

McGraw v. Barnhart, 450 F.3d 493, 498 (10th Cir.2006) (quotation omitted).

The EAJA statute provides that "a court shall award to a *prevailing party* other than the United States fees and other expenses *incurred by that party* in any civil action, including proceedings for judicial review of agency action, brought by or against the United States, unless the court finds that the position of the United States was substantially

justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). As the district court found, this statutory language clearly provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for an award of attorney's fees. *See Gisbrecht v. Barnhart,* 535 U.S. 789, 796, 122 S.Ct. 1817, 152 L.Ed.2d 996 (2002) ("Under EAJA, a party prevailing against the United States in court, including a successful Social Security benefits claimant, may be awarded fees payable by the United States if the Government's position in the litigation was not 'substantially justified.' "); *McGraw,* 450 F.3d at 497, 503 (stating "EAJA award is to the claimant, while counsel receives [the § 406(b)] award" and EAJA "award is to the claimant, who may or may not tender that award to counsel, regardless of their agreement"); *Phillips v. Gen. Servs. Admin.,* 924 F.2d 1577, 1582 (Fed.Cir.1991) (per curiam) ("As the statute requires, any [EAJA] fee award is made to the 'prevailing party,' not the attorney."); *see also City of Burlington v. Dague,* 505 U.S. 557, 572, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) (Blackmun, J., dissenting) ("The provisions at issue in this case, [the Clean Water Act and the Solid Waste Disposal Act,] like fee-shifting provisions generally, authorize fee awards to prevailing *parties,* not their attorneys."); *Venegas v. Mitchell,* 495 U.S. 82, 87, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990) ("Section 1988[4] makes the prevailing *party* eligible

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[4] In part, 42 U.S.C. § 1988(b) states that "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of [title 42], the court, in its discretion,

for a discretionary award of attorney's fees [I]t is the party, rather than the lawyer, who is eligible '); *id.* at 89, 110 S.Ct. 1679 ("[W]e have already rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff.");[5] *Evans v. Jeff D.*, 475 U.S. 717, 730, 731–32, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986) (holding in § 1988(b) case that Congress gave prevailing party statutory eligibility for discretionary award of attorney's fees and statute did not bestow fee award on attorney); *Weeks v. Indep. Sch. Dist. No. I–89*, 230 F.3d 1201, 1213 (10th Cir. 2000) (relying on case law addressing attorney's fees under § 1988 and deciding that "prevailing party" language in Fed. R.Civ.P. 54(d)

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may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[5] Congress has enacted numerous fee-shifting statutes awarding fees to prevailing parties. *See, e.g., W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88–89 & n. 4, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) (listing some fee-shifting statutes), *superceded by statute*, Civil Rights Act of 1991, Pub.L. No. 102–166, § 113, 105 Stat. 1071, 1079 (amending § 1988 to permit recovery of expert witness fees). The Supreme Court has held that legal principles from cases addressing other fee-shifting statutes, such as § 1988, apply to EAJA cases. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n. 4, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) (recognizing that Court has interpreted fee-shifting provisions consistently); *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n. 2, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989) ("We have stated in the past that fee-shifting statutes' similar language is 'a strong indication' that they are to be interpreted alike."); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (deciding that interpretation of term "prevailing party" in § 1988 is "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party' ").

refers to party and not to attorney); *Turner v. Sec'y of Air Force*, 944 F.2d 804, 808 & n. 2 (11th Cir.1991) (relying on case law dealing with § 1988 and holding in 42 U.S.C. § 2000e–5(k) case that "[i]t is clear that the award of attorneys' fees belongs to the prevailing party, not to the attorney representing the party"); *United States v. Adkinson*, 256 F.Supp.2d 1297, 1318 (N.D.Fla.2003) ("[T]he [EAJA] fee award belongs to the client, and an attorney has no independent right to a fee award under the EAJA."), *aff'd*, 360 F.3d 1257 (11th Cir.2004) (per curiam).

In addition to the "prevailing party" language, other parts of the EAJA statute "affirmatively rule out the attorney as a recognized applicant for fees and expenses." *Panola Land Buying Ass'n v. Clark*, 844 F.2d 1506, 1511 (11th Cir.1988). In defining "fees and other expenses," the EAJA treats attorneys in the same manner as it treats "expert witnesses, engineers, scientists, analysts, or other persons found by the court to be" needed to prepare the case. *Id.; see also* 28 U.S.C. § 2412(d)(2)(A). In addition, the EAJA requires that to apply for fees and other expenses, the prevailing party must submit an itemized statement from the attorney or expert stating the time expended and the fee rate. 28 U.S.C. § 2412(d)(1)(B). Lastly, the EAJA statute conditions eligibility for attorney's fees upon the prevailing party, not the attorney, not having a net worth exceeding $2,000,000. *Id.* The EAJA therefore permits attorney's fees reimbursement to financially eligible prevailing parties, who make a proper application, and not to their attorneys.

Although the statutory language alone makes it clear that the prevailing party and not the attorney may recover an award of attorney's fees, the legislative history for the EAJA also makes it clear that certain prevailing parties, and not their attorneys, may recover attorney's fees when the government's action was not substantially justified. *See* H.R.Rep. No. 96–1418, at 5–6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4984. The EAJA

> rests on the premise that certain individuals may be deterred from seeking review of unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States, unless the Government action was substantially justified.

Id. This statement of purpose directly addresses the question whether the EAJA fees are for the claimant or for the claimant's attorney and clearly states that the fees are for the claimant. *See Panola Land Buying Ass'n*, 844 F.2d at 1511 (noting that federal fee statutes were not "enacted for the benefit of the Bar" but "for the benefit of the persons the statutes are designed to reach"). "[T]he specific purpose of the

EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Comm'r v. Jean,* 496 U.S. 154, 163, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990). The EAJA therefore was not enacted for the benefit of counsel to ensure that counsel gets paid. *Panola Land Buying Ass'n,* 844 F.2d at 1511.

Ms. Manning, however, maintains that unmodified portions of the EAJA anticipate that her attorney will receive the EAJA fee award. In particular, she points to Pub.L. 99–80, § 3, 99 Stat. 186 (1985). This section, however, refers to the fact that the attorney must return to the claimant the smaller of the two fee awards under the EAJA or under 42 U.S.C. § 406(b)(1). It does not state that the attorney is entitled to receive the full amount of the EAJA fees awarded. Rather, the purpose is to ensure that the attorney does not receive double compensation.

The language of § 406(b)(1) further supports the conclusion that the EAJA award is for the prevailing party and not her attorney. Under § 406(b), the Commissioner "must withhold and pay a reasonable attorney's fee directly to the attorney out of the claimant's past-due benefits, thus guaranteeing payment to the attorney and avoiding collection problems, but the amount of the attorney's fee that must be withheld and directly paid to the attorney is limited to the maximum of 25% of past-due benefits." *Burnett v. Heckler,* 756 F.2d 621, 626 (8th Cir.1985). Thus, unlike the EAJA, § 406(b) expressly provides for payment to the attorney.

Congress has not substantially amended § 406(b) since enacting the EAJA. From this, we draw the conclusion that Congress knows what language to use to award attorney's fees to an attorney and what language to use when it chooses to award the fees to the prevailing party. Congress could have worded the EAJA statute to award attorney's fees to the attorney, but it did not do so.

Further support for the conclusion that the EAJA award is for the prevailing party and not for the attorney is the settled law that the attorney does not have standing to apply for the EAJA fees; that right belongs to the prevailing party. *See Oguachuba v. INS,* 706 F.2d 93, 97–98 (2d Cir.1983). Just as a prevailing party cannot assign her underlying substantive action, she cannot assign her right to seek attorney's fees, which is derivative of the underlying substantive action, to her attorney. *Cf. Pony v. County of Los Angeles,* 433 F.3d 1138, 1140, 1142–44 (9th Cir.) (addressing attorney's fees under § 1988 and rejecting as invalid under California law plaintiff's putative assignment of right to apply for attorney's fees), *cert. denied,* 547 U.S. 1193, 126 S.Ct. 2864, 165 L.Ed.2d 896 (2006). Only after the prevailing party exercises her right to seek an award of attorney's fees under the EAJA and obtains an award may her attorney pursue collection of the attorney's fees. *See id.* at 1142, 1144.

Citing *Willis v. Government Accountability Office,* 448 F.3d 1341, 1347 (Fed.Cir. 2006), *cert. denied,* —— U.S. ——, 127 S.Ct. 1356, 167 L.Ed.2d 76 (2007), and *United States ex rel. Virani v. Jerry M.*

Lewis Truck Parts & Equipment, Inc., 89 F.3d 574, 577 (9th Cir.1996), Ms. Manning argues that even though the EAJA statute gives her the right to claim the fees, her attorney has the right to receive the awarded fees. Because these cases are distinguishable, we reject this argument.

The Ninth Circuit has held that *Virani*, a qui tam action under the False Claims Act, does not apply to fee awards under § 1988. *Gilbrook v. City of Westminster*, 177 F.3d 839, 874 (9th Cir.1999). The court noted that there are significant differences between a fee award in a qui tam action and in a § 1988 action. *Gilbrook*, 177 F.3d at 874. Those differences are (1) that the Supreme Court has held that fee awards under § 1988 are bestowed upon the prevailing party and not the attorney; (2) that the governmental-harm concerns present in a qui tam action are not present in a civil rights action; and (3) that denying direct payment to attorneys is consistent with § 1988's purpose of attracting counsel to represent civil rights plaintiffs. *Id.* (citing *Jeff D.*, 475 U.S. at 731–32, 106 S.Ct. 1531). *Gilbrook* therefore specifically held that "[i]n the absence of a contractual assignment [of the fee award] to counsel, § 1988 requires that attorney fee awards be made directly to the prevailing party." 177 F.3d at 875. Based on our previous discussion that legal principles from § 1988 cases apply to EAJA cases, we conclude that *Gilbrook*'s analysis and holding are equally applicable in an EAJA case.

Willis, a case under the Civil Service Reform Act, is distinguishable on the ground that it

addressed the issue whether the attorney had standing to claim attorney fees under that Act. 448 F.3d at 1342. It cited Virani with approval only to differentiate between the plaintiff's right to seek the fees and the attorney's right to collect the awarded fees. *Willis,* 448 F.3d at 1347. But in a footnote, *Willis* recognized that, in an EAJA context, the client, not the lawyer, has the right to collect the fees. *Id.* at 1347 n. 3 (citing *FDL Techs., Inc. v. United States,* 967 F.2d 1578, 1580–81 (Fed.Cir.1992), which addresses different EAJA provision, 5 U.S.C. § 504(a)(1), but discusses 28 U.S.C. § 2412(d)(1)(A) and determines they are comparable and that under both provisions prevailing party is entitled to fee award).

Further, Ms. Manning argues that because pro se litigants are not eligible for the award of EAJA attorney's fees, *see Demarest v. Manspeaker,* 948 F.2d 655, 655–56 (10th Cir.1991), the intention of the statute is to provide the attorney with the award. But she fails to recognize that the purpose of the fee award is to allow a claimant to present her claims without having to bear the cost of litigation. *See id.* at 656. If one of the costs the successful claimant has borne is attorney's fees, then she may, if eligible, recover them under the statute.

Ms. Manning cites *Dixon–Townsell v. Barnhart,* 445 F.Supp.2d 1283 (N.D.Okla. 2006), as authority for reversing an offset of the EAJA fee award. In *Dixon–Townsell,* the Social Security claimant's EAJA fee award was completely offset under the Debt Collection Improvement Act of 1996

by an amount owed for unpaid child support. *Id.* at 1284. The claimant moved either to set aside the administrative offset or to correct under Rule 60(a) the clerical error of awarding fees to the claimant. *Dixon–Townsell,* 445 F.Supp.2d at 1284. The district court granted Rule 60(a) relief, amending the order to state that the EAJA attorney's fees award should be paid to counsel, and not to the claimant. *Dixon–Townsell,* 445 F.Supp.2d at 1284–85. The court found that the offset could be set aside and the Commissioner had the authority to retrieve the offset money pursuant to 31 C.F.R. § 285.4(h). *Dixon–Townsell,* 445 F.Supp.2d at 1285. The court also found that there was no authority to grant the EAJA fees to the claimant, because the fees are intended to compensate counsel and not to generate income for the claimant. *Id.* (citing *Demarest,* 948 F.2d at 656).

We reject the conclusions reached in *Dixon–Townsell.* First, it neither discusses the plain language of the EAJA statute, nor considers the legislative history or case law interpreting the statute. In Ms. Manning's case, the award was correctly made to her and not to her attorney based on the clear statutory language that the award is to the prevailing party. *See Reeves v. Barnhart,* 473 F.Supp.2d 1173, 1176–77 (M.D.Ala.2007) (distinguishing and rejecting *Dixon–Townsell*); *see also McCarty v. Astrue,* 505 F.Supp.2d 624, 630–31 (N.D.Cal.2007) (rejecting *Dixon–Townsell* as not persuasive). *Dixon–Townsell*'s citation to *Demarest* was inapposite, because, as indicated above, that case set forth the rule that pro se plaintiffs may not receive EAJA attorney's fees awards, and neither

Mr. Dixon–Townsell nor Ms. Manning proceeded pro se. *See Reeves,* 473 F.Supp.2d at 1177. And *Demarest* did not hold that the EAJA attorney's fees should be paid to counsel.

Continuing to argue that the EAJA award is for her attorney, Ms. Manning contends that it is customary in the Tenth Circuit for the EAJA attorney's fees to be paid directly to counsel. It is true, as she points out, that this court in *Weakley,* 803 F.2d at 580, ordered the government to pay EAJA attorney's fees to the plaintiff's attorney. But we did not address whether the Social Security claimant or the claimant's attorney was entitled to recover the fees under the EAJA statute. We merely awarded attorney's fees under § 406(b) and under the EAJA at the same time. *Weakley,* 803 F.2d at 580. Because the EAJA fees were greater than the § 406(b) fees, we ordered that counsel pay the smaller amount, represented by the § 406(b) fees, to the claimant. *Weakley,* 803 F.2d at 580. We have, however, more recently specifically stated in *McGraw,* based on analysis of the EAJA language, that the EAJA award is to the claimant, whereas the § 406(b) award is to counsel.[6] *McGraw,* 450 F.3d at 497.[7]

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[6] The issue presented in *McGraw* was whether § 406(b)(1) "allows the district court to award attorney's fees to claimant's counsel when the court remands a Title II Social Security disability case for further proceedings and the Commissioner ultimately determines that the claimant is entitled to an award of past-due benefits." *McGraw,* 450 F.3d at 495–96.

[7] Other courts have ordered payment of the EAJA attorney's fees directly to attorneys. *See, e.g., Garcia v. Sullivan,* 781

Ms. Manning next argues that providing payment to her, instead of to counsel, might result in counsel receiving no payment for the work he has performed, thereby negating the purpose of the EAJA. She also contends that paying all the EAJA fees to the claimant directly would have a chilling effect on a claimant's ability to obtain representation. Ms. Manning's argument is purely speculative. Even if it is true, the clear language of the statute provides that attorney's fees are paid to the prevailing party, not the attorney. And in *Jeff D.*, 475 U.S. at 741 n. 34, 106 S.Ct. 1531, the Supreme Court addressed and rejected a similar argument:

> We are cognizant of the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases. If this occurred, the pool of lawyers willing to represent plaintiffs in such cases might shrink, constricting the "effective assess to the judicial process" for persons with civil rights grievances which the Fees Act was intended to

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F.Supp. 969, 974 (S.D.N.Y.1991); *Price v. Sullivan*, 756 F.Supp. 400, 405 (E.D.Wis.1991); *Barriger v. Bowen*, 673 F.Supp. 1167, 1170 (N.D.N.Y. 1987). None of these cases addressed why the fees were paid to counsel instead of to the claimant or whether the fee awards belonged to counsel or to the claimant. The Seventh Circuit has noted that while "[t]echnically the award of attorney's fees under section 1988 is to the party, not to his lawyer, it is common to make the award directly to the lawyer where the lawyer's contractual entitlement is uncontested." *Richardson v. Penfold*, 900 F.2d 116, 117 (7th Cir.1990).

> provide. We believe, however, that as a practical matter the likelihood of this circumstance arising is remote.

Ms. Manning argues that the district court ignored the taxation problems that would occur to her if the EAJA fee award is paid directly to her. Like the lien issues mentioned in the first section of this decision, the taxation issues were not developed in the district court. But because, as discussed above, the EAJA attorney's fees belong to the prevailing party, we can easily conclude that Ms. Manning is properly taxed on that income. *Cf. Campbell v. Commissioner,* 274 F.3d 1312, 1313–14 (10th Cir.2001) (holding that award of attorney's fees under Title VII is income to former employee); *Sinyard v. Commissioner* 268 F.3d 756, 757, 759 (9th Cir. 2001) (holding that attorney's fees paid on prevailing party's behalf pursuant to court order approving settlement of Age Discrimination in Employment Act class actions are income to prevailing party). *See generally Commissioner v. Banks,* 543 U.S. 426, 438–39, 125 S.Ct. 826, 160 L.Ed.2d 859 (2005) (declining to address argument that effectiveness of fee-shifting statutes is undermined by treating statutory fee awards as income to plaintiff).

Although we conclude that the award of EAJA attorney's fees is to Ms. Manning and not to her attorney, we recognize that perhaps the answer is not as clear as it would appear to be from the statutory language, legislative history, and case law. Admittedly, it seems counter intuitive to hold that an

award of attorney's fees does not go to the attorney, especially since the EAJA fees are calculated based on the time spent by the attorney and based on the attorney's hourly rate, *see* 28 U.S.C. § 2412(d)(1)(B), (2)(A). Indeed, the answer to the question "who do the fees go to" was not clear to the government, because it switched positions during the course of this litigation. In the district court, it consistently took the position that the award belonged to the attorney. But on appeal, it took the position that the award belonged to Ms. Manning.[8] Despite the government's confusion, we are bound by the statutory language, legislative history, and case law, which has been set forth in detail above.

III. Are the EAJA Fees Subject to Offset Under the Debt Collection Improvement Act for Unpaid Student Loan Debts?

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[8] On appeal, the Commissioner attempted to justify the stipulation as follows.

> Since district courts within the region from time to time have ordered [the Social Security Administration] to pay EAJA fees directly to counsel, see, *e.g., Dixon-Townsell v. Barnhart*, 445 F.Supp.2d 1283, 1285 (N.D.Okla.2006), the government acquiesced in counsel's belief that the magistrate judge might have made a clerical error in awarding the EAJA fees here to the plaintiff instead of her attorney. The magistrate judge, however, made clear that he had not "committed a clerical error in awarding attorneys' fees under the EAJA to the Plaintiff instead of awarding them to her attorney." Thus, the premise of the government's stipulation was invalid.

Aplee. Br. at 9 n. 4 (appendix citation omitted).

Under the Debt Collection Improvement Act, the Department of the Treasury's Financial Management Service has the authority to collect nontax debts owed to the United States government by offsetting payments made by other federal agencies. *See* 31 U.S.C. § 3716; 31 C.F.R. § 285.5(a)(1); *see also* Exec. Order No. 13,019, 61 Fed.Reg. 51,763 (Sept. 28, 1996) ("[T]he primary purpose of the Debt Collection Improvement Act is to increase the collection of nontax debts owed to the Federal Government"). All federal payments, including "fees," are subject to administrative offset. 31 C.F.R. § 285.5(e)(1). The only exceptions are for those payments specifically listed. *Id.* § 285.5(e)(2); *see also* § 285.5(e)(3)(i)(A) (noting that special rules apply to offset of Social Security benefit payments, excluding SSI payments). One payment type excluded from offset is payments for which a statute expressly prohibits offset. *Id.* § 285.5(e)(2)(v); *see also* 31 U.S.C. § 3716(e)(2). An EAJA award is not among the listed exceptions in § 285.5(e)(2). Nor does the EAJA statute prohibit offset of any fee award. *See* 28 U.S.C. § 2412. Furthermore, the Debt Collection Improvement Act does not exempt an EAJA attorney's fees award from offset. *See* 28 U.S.C. § 3716. Thus, it is clear that the Debt Collection Improvement Act is sufficiently broad to offset an EAJA fees award for an unpaid student loan debt owed to the federal government.

Ms. Manning argues that the district court abused its discretion by failing to consider the holding in *Lockhart v. United States*, 546 U.S. 142,

126 S.Ct. 699, 163 L.Ed.2d 557 (2005), that the United States may offset an outstanding school loan debt from Social Security benefits beyond a ten year statute of limitations period. She contends that *Lockhart* did not make a similar holding with respect to an offset from the EAJA attorney's fees. Relying on *McGraw,* 450 F.3d at 497, she points out that the EAJA fees are not paid out of Social Security benefits. This argument is without merit, because the Higher Education Technical Amendments of 1991, Pub.L. No. 102–26, § 3, 105 Stat. 123, 124–25 (codified at 20 U.S.C. § 1091 a(a)), which was relied on in *Lockhart,* eliminated the statute of limitations for all student loan collections. Thus, the district court did not abuse its discretion by failing to consider that under *Lockhart* the government can recover outstanding student loan debt from Social Security benefits.

Instead, the fact that Social Security benefits can be offset arguably provides further support for the conclusion that the EAJA fees award can be offset. The purpose of disability benefits is to provide "income required for ordinary and necessary living expenses." 20 C.F.R. § 404.508(a). To the extent that the Debt Collection Improvement Act reaches Social Security disability benefits, whose purpose is to provide income for living expenses, it certainly follows that the Act includes EAJA fees. In comparison, attorney's fees paid directly to an attorney under § 406 are not subject to offset, simply because they are paid directly to the attorney.

We conclude that the EAJA attorney's fees award was properly paid to Ms. Manning and that those fees were subject to administrative offset by the Debt Collection Improvement Act for student loan debts she owed to the Department of Education. The judgment of the district court is therefore AFFIRMED. Ms. Manning's unopposed motion to file an addendum of recent citations is GRANTED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

JANET C. MANNING,

Plaintiff,

v. **No. CIV-04-021-SPS**

JO ANNE B. BARNHART, Commissioner of the Social Security Administration,

Defendant.

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF PURSUANT TO FED. R. CIV. P. 60

The Plaintiff Janet C. Manning was the prevailing party in this social security appeal and requested that her attorney be awarded costs and fees under the Equal Access to Justice Act (the "EAJA"), 28 U.S.C. § 2412. The Commissioner did not object, so the Court awarded a total of $5,958.30 to the Plaintiff (not her attorney) in accordance with 28 U.S.C. § 2412(d)(1)(A). When the money was paid, the United States applied an administrative offset on a student loan debt owed by the Plaintiff to the Department of Education and deducted $1,966.12 from the EAJA award. The Plaintiff thereupon filed a combined Motion to Set Aside Wrongful Offset of *EAJA* Attorney Fee and Motion for Fed. R. Civ. P.

Rule 60(a) Order and Motion to Hold Further Pleadings in Abeyance [Docket No. 18]. While these motions were pending, the Plaintiff attempted to resolve the underlying issues informally but was apparently unable to do so. The Commissioner did, however, stipulate that the relief sought by the Plaintiff could be granted, *i. e.*, that the Court could set aside its July 1, 2005 order awarding attorneys' fees to the Plaintiff [Docket No. 17] and substitute in its place an order awarding attorneys' fees to the Plaintiff's attorney. The parties submitted a proposed order to accomplish this result. *See* Docket No. 27. The Plaintiff's substantive motions are therefore now ripe for determination by the Court.[9]

Initially, the Court would observe that the Plaintiff's motion should have been made pursuant to Fed. R. Civ. P. 60(b)(1). Relief under Fed. R. Civ. P. 60(a) would be appropriate if the Court had simply committed a clerical error in awarding attorneys' fees under the EAJA to the Plaintiff instead of awarding them to her attorney. However, this is not what happened here; the Court fully intended to award attorneys' fees not to the Plaintiff's attorney but instead to the Plaintiff herself as the prevailing party in accordance with the clear language of the EAJA. *See* 28 U.S.C. § 2412(d)(1)(A) ("Except as otherwise specifically provided by statute, a court shall award *to a prevailing party* other than the United States fees and other expenses, in addition to

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[9] The Court has previously determined that the Plaintiff's Motion to Hold Further Pleading in Abeyance was moot. *See* Docket No. 19.

any costs awarded pursuant to subsection (a), incurred *by that party* in any civil action (other than cases sounding in tort)[.]") [emphasis added]. Assuming *arguendo* this was error, it was legal rather than clerical. *See Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996) ("Thus, as a general proposition, the 'mistake' provision in Rule 60(b)(1) provides for the reconsideration of judgments only where: (1) a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority from a party, or (2) where the judge has made a substantive mistake of law or fact in the final judgment or order."). On the other hand, the Plaintiff did seek relief pursuant to Fed. R. Civ. P. 60 within the time allowed for appealing the Court's order awarding attorneys' fees. *See id.* at 578 ("[W]hen Rule 60(b)(1) is used to challenge a substantive ruling by the district court, we have required that such a motion be filed within the time frame required for the filing of a notice of appeal. That is, we have construed the requirement in Rule 60(b)(1) that 'the motion shall be filed within a reasonable time' in this situation to be contemporaneous with the time constraints for taking a direct appeal."), *citing Van Skiver v. United States,* 952 F.2d 1241, 1244 (10th Cir. 1991). The Court may therefore entertain the Plaintiff's motion pursuant to Fed. R. Civ.P. 60(b)(1).

The Plaintiff argues that it was error for the Court to award attorneys' fees under the EAJA directly to her instead of awarding them to her attorney *notwithstanding* the clear language of 28 U.S.C. § 2412(d)(1)(A). The Plaintiff cites no

authority for this remarkable proposition, presumably because *there is none*. While there is authority for the proposition that it would not be inappropriate for the Court to order EAJA fees paid directly to the Plaintiff's attorney, *see, e. g., Lowrance v. Hacker,* 966 F.2d 1153, 1156 (7th Cir. 1992); *but see Phillips v. General Services Administration,* 924 F.2d 1577, 1582 (Fed. Cir. 1991) ("As the statute requires, any fee award is made to the 'prevailing party,' not the attorney. Thus, Phillips' attorney could not directly claim or be entitled to the award. "), the latest authority in this circuit would seem to be to the contrary. *See McGraw v. Barnhart*, 450 F.3d 493, 497 (10th Cir. 2006) (contrasting an award of attorneys' fees under EAJA with an award under the Social Security Act and observing that "an EAJA award is to the claimant, while counsel receives an SSA award.").[10] In any event, the Court declines to

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[10] The Plaintiff cites *Weakley v. Bowen*, 803 F.2d 575 (10th Cir. 1986) as Tenth Circuit authority for the proposition that it is appropriate to award attorneys' fees under the EAJA directly to a claimant's attorney. However, *Weakley* is most often cited (in this Court, at least) for the proposition that when attorneys' fees are awarded under the EAJA as well as under the Social Security Act (the "SSA"), 42 U.S.C. § 406(b)(1), the claimant is entitled to be paid the smaller of the two amounts. *Id.* at 580 ("To prevent double payment of fees for the same work under both statutes, however, Congress directed that the smaller amount be given to the client, since the Social Security Act fee award reduces the client's recovery of past due benefits.") [citation omitted]. By the time the *Weakley* court awarded attorneys' fees under the EAJA, the Commissioner had already awarded benefits to the claimant and withheld therefrom attorneys' fees due under the SSA. Inasmuch as the EAJA fees were greater than the SSA fees, the fact that the *Weakley* court ordered the former paid directly to the claimant's attorney

hold that it acted erroneously in following the clear dictates of 28 U.S.C. § 2412(d)(1)(A), which is unambiguous and is therefore not subject to any construction by the Court. *See, e. g., Schusterman v. United States,* 63 F.3d 986, 989 (10th Cir. 1995) ("In statutory interpretation we look to the plain language of the statute and give effect to its meaning . . . If the statute is clear, that is the end of our inquiry.") [internal citations omitted].

Furthermore, although the Court is not unsympathetic to the effect of its ruling on the Plaintiff's attorney, to do what the Plaintiff asks here would be clearly erroneous. Simply put, the Plaintiff urges the Court to ignore the clear language of the EAJA and award attorneys' fees directly to her attorney in order to circumvent the offset applied by the Department of Education. The effect of such action would be to summarily decide disputes not properly before the Court: (i) whether the United States may legally assert an offset against fees awarded to the Plaintiff under the EAJA; (ii) whether the Plaintiff's attorney has an enforceable lien on the EAJA fee award arising out of his contract with the Plaintiff, *see, e. g., State ex rel. Oklahoma Bar Ass'n v. Cummings,* 1993 OK 127, ¶ 12, 863 P.2d 1164, 1168-69 ("Oklahoma law recognizes two types of lien by which a lawyer may secure payment for services: (1) a statutory charging lien [under 5 Okla. Stat. § 6] and (2) a common-law

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would seem to illustrate nothing more than the proposition for which *Weakley* is typically cited, *i. e.*, when fees are awarded under both statutes, the larger portion goes to the attorney and the smaller to the claimant. *See id.* at 580.

lien [under 5 Okla. Stat. §6] and (2) a common–law general possessory or retaining lien.") [footnotes omitted]; and, (iii) whether any attorney's lien has priority over the government's right of offset. Assuming *arguendo* that it would not otherwise be inappropriate to order the payment of the Plaintiff's EAJA fees directly to her attorney, it clearly would be inappropriate to do so in the face of these unresolved disputes.[11]3

Accordingly, the Plaintiff's Motion to Set Aside Wrongful Offset of *EAJA* Attorney Fee and Motion for Fed. R. Civ. P. Rule 60(a) Order are hereby DENIED.

IT IS SO ORDERED this 27th day of October, 2006.

s/ Steven P. Shreder
STEVEN P. SHREDER

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[11] It seems clear that these disputes *do* in fact remain unresolved. On the one hand, the United States Attorney (who represents the Commissioner in this action but who would presumably have authority to speak on behalf of the Department of Education as well) has stipulated to the entry of an order *nunc pro tunc* awarding the Plaintiff's EAJA attorneys' fees directly to Plaintiff's attorney. But on the other hand, the Plaintiff urged the Court to act on her motions only after failing to resolve her dispute with the Department of Education informally. Given this state of affairs, it seems doubtful the Court would have jurisdiction to set aside the offset, at least in the context of *this* action. Even if it did, at a minimum, notice to the Department of Education and an opportunity to be heard on the merits would seem to be required.

UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANET C. MANNING,
Plaintiff-Appellant,

v. No. 06-7127
(D.C. No. 04-CV-21-SPS)
(E.D.Okla.)

MICHAEL J. ASTRUE,
Commissioner, Social Security
Administration,
Defendant-Appellee.

ORDER

Before **HENRY**, Chief Judge, **ANDERSON**, Circuit Judge, and **BRORBY**, Senior Circuit Judge.

Appellant's petition for rehearing is denied by the panel.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc, so rehearing en banc is also denied.

Entered for the Court

s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER,
Clerk

Civil Service Reform Act

Title 5 United States Code, Section7701(g)(1)

Sec. 7701. Appellate procedures.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

Debt Collection Improvement Act of 1996

Title 31 United States Code, Section 3716

Sec. 3716. Administrative offset

(a) After trying to collect a claim from a person under section 3711(a) of this title, the head of an executive, judicial, or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor--

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

(b) Before collecting a claim by administrative offset, the head of an executive, judicial, or legislative agency must either--

(1) adopt, without change, regulations on collecting by administrative offset promulgated by the Department of Justice, the Government Accountability Office, or the Department of the Treasury; or

(2) prescribe regulations on collecting by administrative offset consistent with the regulations referred to in paragraph (1).

(c)(1)(A) Except as otherwise provided in this subsection, a disbursing official of the Department of the Treasury, the Department of Defense, the United States Postal Service, or any other government corporation, or any disbursing official of the United States designated by the Secretary of the Treasury, shall offset at least annually the amount of a payment which a payment certifying agency has certified to the disbursing official for disbursement, by an amount equal to the amount of a claim which a creditor agency has certified to the Secretary of the Treasury pursuant to this subsection.

(B) An agency that designates disbursing officials pursuant to section 3321(c) of this title is not required to certify claims arising out of its operations to the Secretary of the Treasury before such agency's disbursing officials offset such claims.

(C) Payments certified by the Department of Education under a program administered by the Secretary of Education under title IV of the Higher Education Act of 1965 shall not be subject to administrative offset under this subsection.

(2) Neither the disbursing official nor the payment certifying agency shall be liable--

(A) for the amount of the administrative offset on the basis that the underlying obligation, represented by the payment before the administrative offset was taken, was not satisfied; or

(B) for failure to provide timely notice under paragraph (8).

(3)(A)(i) Notwithstanding any other provision of law (including sections 207 and 1631(d)(1) of the Social Security Act (42 U.S.C. 407 and 1383(d)(1)), section 413(b) of Public Law 91-173 (30 U.S.C. 923(b)), and section 14 of the Act of August 29, 1935 (45 U.S.C. 231m)), except as provided in clause (ii), all payments due to an individual under--

(I) the Social Security Act,

(II) part B of the Black Lung Benefits Act, or

(III) any law administered by the Railroad Retirement Board (other than payments that such Board determines to be tier 2 benefits), shall be subject to offset under this section.

(ii) An amount of $9,000 which a debtor may receive under Federal benefit programs cited under clause (i) within a 12-month period shall be exempt from offset under this subsection. In applying the $9,000 exemption, the disbursing official shall--

(I) reduce the $9,000 exemption amount for the 12-month period by the amount of all Federal benefit payments made during such 12-month period which are not subject to offset under this subsection; and

(II) apply a prorated amount of the exemption to each periodic benefit payment to be made to the debtor during the applicable 12-month period. For purposes of the preceding sentence, the amount of a periodic benefit payment shall be the amount after any reduction or deduction required under the laws authorizing the program under which such payment is authorized to be made (including any reduction or deduction to recover any overpayment under such program).

(B) The Secretary of the Treasury shall exempt from administrative offset under this subsection

payments under means-tested programs when requested by the head of the respective agency. The Secretary may exempt other payments from administrative offset under this subsection upon the written request of the head of a payment certifying agency. A written request for exemption of other payments must provide justification for the exemption under standards prescribed by the Secretary. Such standards shall give due consideration to whether administrative offset would tend to interfere substantially with or defeat the purposes of the payment certifying agency's program. The Secretary shall report to the Congress annually on exemptions granted under this section.

(C) The provisions of sections 205(b)(1), 809(a)(1), and 1631(c)(1) of the Social Security Act shall not apply to any administrative offset executed pursuant to this section against benefits authorized by title II, VIII, or title XVI of the Social Security Act, respectively.

(4) The Secretary of the Treasury may charge a fee sufficient to cover the full cost of implementing this subsection. The fee may be collected either by the retention of a portion of amounts collected pursuant to this subsection, or by billing the agency referring or transferring a claim for those amounts. Fees charged to the agencies shall be based on actual administrative offsets completed. Amounts received by the United States as fees under this subsection shall be deposited into the account of the Department of the Treasury under section 3711(g)(7) of this title, and shall be collected and accounted for in accordance with the provisions of that section.

(5) The Secretary of the Treasury in consultation with the Commissioner of Social Security and the Director of the Office of Management and Budget, may prescribe such rules, regulations, and procedures as the Secretary of the Treasury considers necessary to carry out this subsection. The Secretary shall consult with the heads of affected agencies in the development of such rules, regulations, and procedures.

(6) Any Federal agency that is owed by a person a past due, legally enforceable nontax debt that is over 180 days delinquent, including nontax debt administered by a third party acting as an agent for the Federal Government, shall notify the Secretary of the Treasury of all such nontax debts for purposes of administrative offset under this subsection.

(7)(A) The disbursing official conducting an administrative offset with respect to a payment to a payee shall notify the payee in writing of--

(i) the occurrence of the administrative offset to satisfy a past due legally enforceable debt, including a description of the type and amount of the payment otherwise payable to the payee against which the offset was executed;

(ii) the identity of the creditor agency requesting the offset; and

(iii) a contact point within the creditor agency that will handle concerns regarding the offset.

(B) If the payment to be offset is a periodic benefit payment, the disbursing official shall take reasonable steps, as determined by the Secretary of the Treasury, to provide the notice to the payee not later than the date on which the payee is otherwise scheduled to receive the payment, or as soon as

practical thereafter, but no later than the date of the administrative offset. Notwithstanding the preceding sentence, the failure of the debtor to receive such notice shall not impair the legality of such administrative offset.

(8) A levy pursuant to the Internal Revenue Code of 1986 shall take precedence over requests for administrative offset pursuant to other laws.

(d) Nothing in this section is intended to prohibit the use of any other administrative offset authority existing under statute or common law.

(e) This section does not apply--

(1) to a claim under this subchapter that has been outstanding for more than 10 years; or

(2) when a statute explicitly prohibits using administrative offset or setoff to collect the claim or type of claim involved.

(f) The Secretary may waive the requirements of sections 552a(o) and (p) of title 5 for administrative offset or claims collection upon written certification by the head of a State or an executive, judicial, or legislative agency seeking to collect the claim that the requirements of subsection (a) of this section have been met.

(g) The Data Integrity Board of the Department of the Treasury established under 552a(u) of title 5 shall review and include in reports under paragraph (3)(D) of that section a description of any matching activities conducted under this section. If the Secretary has granted a waiver under subsection (f) of this section, no other Data Integrity Board is required to take any action under section 552a(u) of title 5.

(h)(1) The Secretary may, in the discretion of the Secretary, apply subsection (a) with respect to any past-due, legally-enforceable debt owed to a State if--

(A) the appropriate State disbursing official requests that an offset be performed; and

(B) a reciprocal agreement with the State is in effect which contains, at a minimum--

(i) requirements substantially equivalent to subsection (b) of this section; and

(ii) any other requirements which the Secretary considers appropriate to facilitate the offset and prevent duplicative efforts.

(2) This subsection does not apply to--

(A) the collection of a debt or claim on which the administrative costs associated with the collection of the debt or claim exceed the amount of the debt or claim;

(B) any collection of any other type, class, or amount of claim, as the Secretary considers necessary to protect the interest of the United States; or

(C) the disbursement of any class or type of payment exempted by the Secretary of the Treasury at the request of a Federal agency.

(3) In applying this section with respect to any debt owed to a State, subsection (c)(3)(A) shall not apply.

(Added Pub. L. 97-452, Sec. 1(16)(A), Jan. 12, 1983, 96 Stat. 2471; amended Pub. L. 104-134, title III, Sec. 31001(c)(1), (d)(2), (e), (f), Apr. 26, 1996, 110 Stat. 1321-359, 1321-362; Pub. L. 106-169, title II, Sec. 251(b)(10), Dec. 14, 1999, 113 Stat. 1856; Pub. L. 108-271, Sec. 8(b), July 7, 2004, 118 Stat. 814.)

Debt Collection Improvement Act of 1996

Title 31 United States Code, Section 3728

Sec. 3728. Setoff against judgment

(a) The Secretary of the Treasury shall withhold paying that part of a judgment against the United States Government presented to the Secretary that is equal to a debt the plaintiff owes the Government.

(b) The Secretary shall--

(1) discharge the debt if the plaintiff agrees to the setoff and discharges a part of the judgment equal to the debt; or

(2)(A) withhold payment of an additional amount the Secretary decides will cover legal costs of bringing a civil action for the debt if the plaintiff denies the debt or does not agree to the setoff; and

(B) have a civil action brought if one has not already been brought.

(c) If the Government loses a civil action to recover a debt or recovers less than the amount the Secretary withholds under this section, the Secretary shall pay the plaintiff the balance and interest of 6 percent for the time the money is withheld.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 977; Pub. L. 104-316, title II, Sec. 202(p), Oct. 19, 1996, 110 Stat. 3844.)

Internal Revenue Code

Title 26 United States Code, Section 7430(a)-(d)

Sec. 7430. Awarding of costs and certain fees

(a) In general. In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for--

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and

(2) reasonable litigation costs incurred in connection with such court proceeding.

(b) Limitations.

(1) Requirement that administrative remedies be exhausted. A judgment for reasonable litigation costs shall not be awarded under subsection (a) in any court proceeding unless the court determines that the prevailing party has exhausted the administrative remedies available to such party within the Internal Revenue Service. Any failure to agree to an extension of the time for the assessment of any tax shall not be taken into account for purposes of determining whether the prevailing party meets the requirements of the preceding sentence.

(2) Only costs allocable to the United States. An award under subsection (a) shall be made only for reasonable litigation and administrative costs which

are allocable to the United States and not to any other party.

(3) Costs denied where party prevailing protracts proceedings. No award for reasonable litigation and administrative costs may be made under subsection (a) with respect to any portion of the administrative or court proceeding during which the prevailing party has unreasonably protracted such proceeding.

(4) Period for applying to IRS for administrative costs. An award may be made under subsection (a) by the Internal Revenue Service for reasonable administrative costs only if the prevailing party files an application with the Internal Revenue Service for such costs before the 91st day after the date on which the final decision of the Internal Revenue Service as to the determination of the tax, interest, or penalty is mailed to such party.

(c) Definitions. For purposes of this section--

(1) Reasonable litigation costs. The term ``reasonable litigation costs'' includes--

(A) reasonable court costs, and

(B) based upon prevailing market rates for the kind or quality of services furnished--

(i) the reasonable expenses of expert witnesses in connection with a court proceeding, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States,

(ii) the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and

(iii) reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of $125 per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for such proceeding, the difficulty of the issues presented in the case, or the local availability of tax expertise, justifies a higher rate. In the case of any calendar year beginning after 1996, the dollar amount referred to in clause (iii) shall be increased by an amount equal to such dollar amount multiplied by the cost-of-living adjustment determined under section 1(f)(3) for such calendar year, by substituting ``calendar year 1995'' for ``calendar year 1992'' in subparagraph (B) thereof. If any dollar amount after being increased under the preceding sentence is not a multiple of $10, such dollar amount shall be rounded to the nearest multiple of $10.

(2) Reasonable administrative costs. The term ``reasonable administrative costs'' means--

(A) any administrative fees or similar charges imposed by the Internal Revenue Service, and

(B) expenses, costs, and fees described in paragraph (1)(B), except that any determination made by the court under clause (ii) or (iii) thereof shall be made by the Internal Revenue Service in cases where the determination under paragraph (4)(C) of the awarding of reasonable administrative costs is made by the Internal Revenue Service. Such term shall only include costs incurred on or after whichever of the following is the earliest: (i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of

Appeals; (ii) the date of the notice of deficiency; or (iii) the date on which the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent.

(3) Attorneys' fees.

(A) In general. For purposes of paragraphs (1) and (2), fees for the services of an individual (whether or not an attorney) who is authorized to practice before the Tax Court or before the Internal Revenue Service shall be treated as fees for the services of an attorney.

(B) Pro bono services. The court may award reasonable attorneys' fees under subsection (a) in excess of the attorneys' fees paid or incurred if such fees are less than the reasonable attorneys' fees because an individual is representing the prevailing party for no fee or for a fee which (taking into account all the facts and circumstances) is no more than a nominal fee. This subparagraph shall apply only if such award is paid to such individual or such individual's employer.

(4) Prevailing party.

(A) In general. The term ``prevailing party'' means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved)--

(i) which--

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) which meets the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of section 2412(d)(2)(B) of such title 28 (as so in effect).

(B) Exception if United States establishes that its position was substantially justified

(i) General rule. A party shall not be treated as the prevailing party in a proceeding to which subsection (a) applies if the United States establishes that the position of the United States in the proceeding was substantially justified.

(ii) Presumption of no justification if Internal Revenue Service did not follow certain published guidance. For purposes of clause (i), the position of the United States shall be presumed not to be substantially justified if the Internal Revenue Service did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

(iii) Effect of losing on substantially similar issues. In determining for purposes of clause (i) whether the position of the United States was substantially justified, the court shall take into account whether the United States has lost in courts of appeal for other circuits on substantially similar issues.

(iv) Applicable published guidance. For purposes of clause (ii), the term ``applicable published guidance'' means--

(I) regulations, revenue rulings, revenue procedures, information releases, notices, and announcements, and

(II) any of the following which are issued to the taxpayer: private letter rulings, technical advice memoranda, and determination letters.

(C) Determination as to prevailing party. Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or--

(i) in the case where the final determination with respect to the tax, interest, or penalty is made at the administrative level, by the Internal Revenue Service, or

(ii) in the case where such final determination is made by a court, the court.

(D) Special rules for applying net worth requirement. In applying the requirements of section 2412(d)(2)(B) of title 28, United States Code, for purposes of subparagraph (A)(ii) of this paragraph--

(i) the net worth limitation in clause (i) of such section shall apply to--

(I) an estate but shall be determined as of the date of the decedent's death, and

(II) a trust but shall be determined as of the last day of the taxable year involved in the proceeding, and

(ii) individuals filing a joint return shall be treated as separate individuals for purposes of clause (i) of such section.

(E) Special rules where judgment less than taxpayer's offer.

(i) In general. A party to a court proceeding meeting the requirements of subparagraph (A)(ii) shall be treated as the prevailing party if the liability

of the taxpayer pursuant to the judgment in the proceeding (determined without regard to interest) is equal to or less than the liability of the taxpayer which would have been so determined if the United States had accepted a qualified offer of the party under (g).

(ii) Exceptions. This subparagraph shall not apply to--

(I) any judgment issued pursuant to a settlement; or

(II) any proceeding in which the amount of tax liability is not in issue, including any declaratory judgment proceeding, any proceeding to enforce or quash any summons issued pursuant to this title, and any action to restrain disclosure under section 6110(f).

(iii) Special rules. If this subparagraph applies to any court proceeding--

(I) the determination under clause (i) shall be made by reference to the last qualified offer made with respect to the tax liability at issue in the proceeding; and

(II) reasonable administrative and litigation costs shall only include costs incurred on and after the date of such offer.

(iv) Coordination. This subparagraph shall not apply to a party which is a prevailing party under any other provision of this paragraph.

(5) Administrative proceedings. The term ``administrative proceeding'' means any procedure or other action before the Internal Revenue Service.

(6) Court proceedings. The term ``court proceeding'' means any civil action brought in a court

of the United States (including the Tax Court and the United States Court of Federal Claims).

(7) Position of United States. The term ``position of the United States'' means--

(A) the position taken by the United States in a judicial proceeding to which subsection (a) applies, and

(B) the position taken in an administrative proceeding to which subsection (a) applies as of the earlier of--

(i) the date of the receipt by the taxpayer of the notice of the decision of the Internal Revenue Service Office of Appeals, or

(ii) the date of the notice of deficiency.

(d) Special rules for payment of costs.

(1) Reasonable administrative costs. An award for reasonable administrative costs shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(2) Reasonable litigation costs. An award for reasonable litigation costs shall be payable in the case of the Tax Court in the same manner as such an award by a district court.

* * *

(Added Pub. L. 97-248, title II, Sec. 292(a), Sept. 3, 1982, 96 Stat. 572; amended Pub. L. 98-369, div. A, title VII, Sec. 714(c), July 18, 1984, 98 Stat. 961; Pub. L. 99-514, title XV, Sec. 1551(a)-(g), Oct. 22, 1986, 100 Stat. 2752, 2753; Pub. L. 100-647, title I, Sec. 1015(i), Title VI, Sec. 6239(a), Nov. 10, 1988, 102 Stat. 3571, 3743; Pub. L. 102-572, Title IX, Sec. 902(b)(1), Oct. 29, 1992, 106 Stat. 4516; Pub. L. 104-

168, title VII, Secs. 701(a)-(c)(2), 702(a), 703(a), 704(a), July 30, 1996, 110 Stat. 1463, 1464; Pub. L. 105-34, title XII, Sec. 1285(a)-(c), Title XIV, Sec. 1453(a), Aug. 5, 1997, 111 Stat. 1038, 1055; Pub. L. 105-206, Title III, Sec. 3101(a)-(e), Title VI, Secs. 6012(h), 6014(e), July 22, 1998, 112 Stat. 727, 728, 819, 820; Pub. L. 106-554, Sec. 1(a)(7) [title III, Sec. 319(25)], Dec. 21, 2000, 114 Stat. 2763, 2763A-647.)

Social Security Act

Title 42 United States Code, Section 405(g)

Sec. 405. Evidence, procedure, and certification for payments

(g) Judicial review. Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the

Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact

and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

Social Security Act

Title 42 United States Code, Section 406(b)(1)(A)

Sec. 406. Representation of claimants before Commissioner

(b) Fees for representation before court.

(1)(A) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(B) For purposes of this paragraph--

(i) the term ``past-due benefits'' excludes any benefits with respect to which payment has been continued pursuant to subsection (g) or (h) of section 423 of this title, and

(ii) amounts of past-due benefits shall be determined before any applicable reduction under section 1320a-6(a) of this title.

(Aug. 14, 1935, Ch. 531, Title II, Sec. 206, 49 Stat. 624; Aug. 10, 1939, Ch. 666, Title II, Sec. 201, 53 Stat. 1362, 1372; Aug. 28, 1950, Ch. 809, title I, Sec. 109(b)(1), 64 Stat. 523; Pub. L. 85-840, Title III, Sec. 309, Aug. 28, 1958, 72 Stat. 1034; Pub. L. 89-97, Title III, Sec. 332, July 30, 1965, 79 Stat. 403; Pub. L. 90-248, title I, Sec. 173, Jan. 2, 1968, 81 Stat. 877; Pub. L. 101-239, Title X, Sec. 10307(a)(1), (b)(1), Dec. 19, 1989, 103 Stat. 2484, 2485; Pub. L. 98-369, Title VI, Sec. 2663(l)(1), July 18, 1984, 98 Stat. 1171; Pub. L. 101-508, Title V, Sec. 5106(a)(1), Nov. 5, 1990, 104 Stat. 1388-266; Pub. L. 103-296, Title I, Sec. 107(a)(4), Title III, Sec. 321(f)(3)(B)(i), (4), Aug. 15, 1994, 108 Stat. 1478, 1541, 1542; Pub. L. 106-170, Title IV, Sec. 406(a), (b), Dec. 17, 1999, 113 Stat. 1911, 1912; Pub. L. 108-203, title II, Sec. 205, title III, Sec. 301(a), Mar. 2, 2004, 118 Stat. 512, 519.)

Social Security Act

Title 42 United States Code, Section 1381a

Sec. 1381a. Basic entitlement to benefits

Every aged, blind, or disabled individual who is determined under part A of this subchapter to be eligible on the basis of his income and resources shall, in accordance with and subject to the provisions of this subchapter, be paid benefits by the Commissioner of Social Security.

(Aug. 14, 1935, Ch. 531, title XVI, Sec. 1602, as added Pub. L. 92-603, Title III, Sec. 301, Oct. 30, 1972, 86 Stat. 1465; amended Pub. L. 98-369, Div. B, Title VI, Sec. 2663(j)(2)(E), July 18, 1984, 98 Stat. 1170; Pub. L. 103-296, title I, Sec. 107(a)(1), Aug. 15, 1994, 108 Stat. 1477.)

Title 20 Code of Federal Regulations, Section 416.1100

§ 416.1100 Income and SSI eligibility.

You are eligible for supplemental security income (SSI) benefits if you are an aged, blind, or disabled person who meets the requirements described in subpart B and who has limited income and resources. Thus, the amount of income you have is a major factor in deciding whether you are eligible for SSI benefits and the amount of your benefit. We count income on a monthly basis. Generally, the more income you have the less your benefit will be. If you have too much income, you are not eligible for a benefit. However, we do not count all of your income to determine your eligibility and benefit amount. We explain in the following sections how we treat your income for the SSI program. These rules apply to the Federal benefit and to any optional State supplement paid by us on behalf of a State (§416.2025) except as noted in subpart T and in the Federal-State agreements with individual States. While this subpart explains how we count income, subpart D of these regulations explains how we determine your benefits, including the provision that we generally use countable income in a prior month to determine how much your benefit amount will be for a month in which you are eligible (§416.420).

[50 FR 48573, Nov. 26, 1985]

Title 20 Code of Federal Regulations, Section 416.1102

§ 416.1102 What is income?

Income is anything you receive in cash or in kind that you can use to meet your needs for food and shelter. Sometimes income also includes more or less than you actually receive (see §416.1110 and §416.1123(b)). In-kind income is not cash, but is actually food or shelter, or something you can use to get one of these.

[70 FR 6344, Feb. 7, 2005]

Title 20 Code of Federal Regulations, Section 416.1123

§ 416.1123 How we count unearned income.

(a) *When we count unearned income.* We count unearned income at the earliest of the following points: when you receive it or when it is credited to your account or set aside for your use. We determine your unearned income for each month. We describe exceptions to the rule on how we count unearned income in paragraphs (d), (e) and (f) of this section.

(b) *Amount considered as income.* We may include more or less of your unearned income than you actually receive.

(1) We include more than you actually receive where another benefit payment (such as a social security insurance benefit) (see §416.1121) has been reduced to recover a previous overpayment. You are repaying a legal obligation through the withholding of portions of your benefit amount, and the amount of the debt reduction is also part of your unearned income. *Exception:* We do not include more than you actually receive if you received both SSI benefits and the other benefit at the time the overpayment of the other benefit occurred and the overpaid amount was included in figuring your SSI benefit at that time.

Example: Joe, an SSI beneficiary, is also entitled to social security insurance benefits in the amount of $200 per month. However, because of a prior overpayment of his social security insurance benefits,

$20 per month is being withheld to recover the overpayment. In figuring the amount of his SSI benefits, the full monthly social security insurance benefit of $200 is included in Joe's unearned income. However, if Joe was receiving both benefits when the overpayment of the social security insurance benefit occurred and we then included the overpaid amount as income, we will compute his SSI benefit on the basis of receiving $180 as a social security insurance benefit. This is because we recognize that we computed his SSI benefit on the basis of the higher amount when he was overpaid.

(2) We also include more than you actually receive if amounts are withheld from unearned income because of a garnishment, or to pay a debt or other legal obligation, or to make any other payment such as payment of your Medicare premiums.

(3) We include less than you actually receive if part of the payment is for an expense you had in getting the payment. For example, if you are paid for damages you receive in an accident, we subtract from the amount of the payment your medical, legal, or other expenses connected with the accident. If you receive a retroactive check from a benefit program other than SSI, legal fees connected with the claim are subtracted. We do not subtract from any taxable unearned income the part you have to use to pay personal income taxes. The payment of taxes is not an expense you have in getting income.

(4) In certain situations, we may consider someone else's income to be available to you, whether or not it

actually is. (For the rules on this process, called deeming, see §§416.1160 through 416.1169.)

(c) *In-kind income.* We use the current market value (defined in §416.1101) of in-kind unearned income to determine its value for SSI purposes. We describe some exceptions to this rule in §§416.1131 through 416.1147. If you receive an item that is not fully paid for and are responsible for the balance, only the paid-up value is income to you.

Example: You are given a $1500 automobile but must pay the $1000 due on it. You are receiving income of $500.

(d) *Retroactive monthly social security benefits.* We count retroactive monthly social security benefits according to the rule in paragraph (d)(1) of this section, unless the exception in paragraph (d)(2) of this section applies:

(1) *Periods for which SSI payments have been made.* When you file an application for social security benefits and retroactive monthly social security benefits are payable on that application for a period for which you also received SSI payments (including federally-administered State supplementary payments), we count your retroactive monthly social security benefits as unearned income received in that period. Rather than reducing your SSI payments in months prior to your receipt of a retroactive monthly social security benefit, we will reduce the retroactive social security benefits by an amount equal to the amount of SSI payments (including federally-

administered State supplementary payments) that we would not have paid to you if your social security benefits had been paid when regularly due rather than retroactively (see §404.408b(b)). If a balance is due you from your retroactive social security benefits after this reduction, for SSI purposes we will not count the balance as unearned income in a subsequent month in which you receive it. This is because your social security benefits were used to determine the amount of the reduction. This exception to the unearned income counting rule does not apply to any monthly social security benefits for a period for which you did not receive SSI.

(2) *Social security disability benefits where drug addiction or alcoholism is a contributing factor material to the determination of disability.* If your retroactive social security benefits must be paid in installments because of the limitations on paying lump sum retroactive benefits to disabled recipients whose drug addiction or alcoholism is a contributing factor material to the determination of disability as described in §404.480, we will count the total of such retroactive social security benefits as unearned income in the first month such installments are paid, except to the extent the rule in paragraph (d)(1) of this section would provide that such benefits not be counted.

(e) *Certain veterans benefits.* (1) If you receive a veterans benefit that includes an amount paid to you because of a dependent, we do not count as your unearned income the amount paid to you because of the dependent.

(2) If you are a dependent of an individual who receives a veterans benefit and a portion of the benefit is attributable to you as a dependent, we count the amount attributable to you as your unearned cash income if—

(i) You reside with the individual who receives the veterans benefit, or

(ii) You receive your own separate payment from the Department of Veterans Affairs.

(f) *Uniformed service compensation.* We count compensation for services performed as a member of a uniformed service (as defined in §404.1330 of this chapter) as received in the month in which it is earned.

(Reporting and recordkeeping requirements in paragraph (b) have been approved by the Office of Management and Budget under control number 0960–0128)

[45 FR 65547, Oct. 3, 1980, as amended at 47 FR 4988, Feb. 3, 1982; 47 FR 13794, Apr. 1, 1982; 50 FR 48574, Nov. 26, 1985; 55 FR 20599, May 18, 1990; 56 FR 3212, Jan. 29, 1991; 59 FR 59364, Nov. 17, 1994; 60 FR 8152, Feb. 10, 1995; 71 FR 45378, Aug. 9, 2006]

Title 20 Code of Federal Regulations, Section 416.1160

416.1160 What is deeming of income.

(a) *General.* We use the term deeming to identify the process of considering another person's income to be your own. When the deeming rules apply, it does not matter whether the income of the other person is actually available to you. We must apply these rules anyway. There are four categories of individuals whose income may be deemed to you.

(1) *Ineligible spouse.* If you live in the same household with your ineligible spouse, we look at your spouse's income to decide whether we must deem some of it to you. We do this because we expect your spouse to use some of his or her income to take care of some of your needs.

(2) *Ineligible parent.* If you are a child to whom deeming rules apply (See §416.1165), we look at your parent's income (and that of your parent's spouse) to decide whether we must deem some of it to be yours. We do this because we expect your parent to use some of his or her income to take care of your needs.

(3) *Sponsor of an alien.* If you are an alien who has a sponsor and you first apply for SSI benefits after September 30, 1980, we look at your sponsor's income to decide whether we must deem some of it to be yours. This rule applies for 3 years after you are admitted to the United States for permanent residence and regardless of whether you live in the

same household as your sponsor. We deem your sponsor's income to you because your sponsor agreed to support you (signed an affidavit of support) as a condition of your admission to the United States. If two deeming rules could apply to you because your sponsor is also your ineligible spouse or parent who lives with you, we use the appropriate spouse-to-spouse or parent-to-child deeming rules instead of the sponsor-to-alien rules. If you have a sponsor and also have an ineligible spouse or parent who is not your sponsor and whose income can be deemed to you, both rules apply. If your sponsor is not your parent or spouse but is the ineligible spouse or parent of another SSI beneficiary, we use the sponsor-to-alien deeming rules for you and the appropriate spouse-to-spouse or parent-to-child deeming rules for the other SSI beneficiary.

(4) *Essential person.* If you live in the same household with your essential person (as defined in §416.222), we must look at that person's income to decide whether we must deem some of it to you. We do this because we have increased your benefit to help meet the needs of your essential person.

(b) *When we deem.* We deem income to determine whether you are eligible for a benefit and to determine the amount of your benefit. However, we may consider this income in different months for each purpose.

(1) *Eligibility.* We consider the income of your ineligible spouse, ineligible parent, sponsor or essential person in the current month to determine

whether you are eligible for SSI benefits for that month.

(2) *Amount of benefit.* We consider the income of your ineligible spouse, ineligible parent, sponsor, or essential person in the second month prior to the current month to determine your benefit amount for the current month. *Exceptions:*

(i) We use the income from the first month you are initially eligible for payment of SSI benefits (see §416.501) to determine your benefit amount for that month. In the following month (the second month you are eligible for payment), we use the same countable income that we used in the preceding month to determine your benefit amount.

(ii) To determine your benefit amount for the first month you again become eligible after you have been ineligible for at least a month, we use the same countable income that we use to determine your eligibility for that month. In the following month (the second month of reeligibility), we use the same countable income that we used in the preceding month to determine your benefit amount.

(iii) To determine the amount of your benefit in the current month, if there are certain changes in your situation which we list below, we use only your own countable income in a prior month, excluding any income deemed to you in that month from an ineligible spouse or parent. These changes are the death of your spouse or parent, your attainment of

age 18, or your becoming subject to the $30 Federal benefit rate (§416.211(b)).

(iv) To determine the amount of your benefit for the current month, we do not use income deemed from your essential person beginning with the month you can no longer qualify for the essential person increment (§416.413). We use only your own countable income in a prior month to determine the amount of your benefit for the current month.

(c) *Steps in deeming.* Although the way we deem income varies depending upon whether you are an eligible individual, an eligible child, an alien with a sponsor, or an individual with an essential person, we follow several general steps to determine how much income to deem.

(1) We determine how much earned and unearned income your ineligible spouse, ineligible parent, sponsor, or essential person has, and we apply the appropriate exclusions. (See §416.1161(a) for exclusions that apply to an ineligible parent or spouse, and §416.1161(b) for those that apply to an essential person or to a sponsor.)

(2) Before we deem income to you from either your ineligible spouse or ineligible parent, we allocate an amount for each ineligible child in the household. (Allocations for ineligible children are explained in §416.1163(b) and §416.1165(b).) We also allocate an amount for each eligible alien who is subject to deeming from your ineligible spouse or parent as a

sponsor. (Allocations for eligible aliens are explained in §416.1163(c).)

(3) We then follow the deeming rules which apply to you.

(i) For deeming income from your ineligible spouse, see §416.1163.

(ii) For deeming income from your ineligible parent, see §416.1165.

(iii) For deeming income from your ineligible spouse when you also have an eligible child, see §416.1166.

(iv) For deeming income from your sponsor if you are an alien, see §416.1166a.

(v) For deeming income from your essential person, see §416.1168. The rules on when we stop deeming income from your essential person are in §416.1169.

(vi) For provisions on change in status involving couples see §416.1163(f) and for those involving parents see §416.1165(g).

(d) *Definitions for deeming purposes.* For deeming purposes—

Date of admission to or *date of entry into the United States* means the date established by the Immigration and Naturalization Service as the date the alien is admitted for permanent residence.

Dependent means the same thing as it does for Federal income tax purposes—we mean someone for whom you are entitled to take a deduction on your personal income tax return. *Exception:* An alien and an alien's spouse are not considered to be dependents of the alien's sponsor for the purposes of these rules.

Essential person means someone who was identified as essential to your welfare under a State program that preceded the SSI program. (See §§416.220 through 416.223 for the rules on essential persons.)

Ineligible child means your natural child or adopted child, or the natural or adopted child of your spouse, or the natural or adopted child of your parent or of your parent's spouse (as the terms *child* and *spouse* are defined in §416.1101), who is under age 21, lives in the same household with you, and is not eligible for SSI benefits.

Ineligible parent means a natural or adoptive parent, or the spouse (as defined in §416.1101) of a natural or adoptive parent, who lives with you and is not eligible for SSI benefits. The income of ineligible parents affects your benefit only if you are a child under age 18.

Ineligible spouse means someone who lives with you as your husband or wife and is not eligible for SSI benefits.

Sponsor means an individual (but not an organization such as the congregation of a church or a service club, or an employer who only guarantees

employment for an alien upon entry but does not sign an affidavit of support) who signs an affidavit of support agreeing to support you as a condition of your admission as an alien for permanent residence in the United States.

[52 FR 8882, Mar. 20, 1987, as amended at 54 FR 19164, May 4, 1989; 64 FR 31974, June 15, 1999]

Title 31 Code of Federal Regulations, Section 285.5(a)-(c) & (e)(1)-(3)(i)(A)

§ 285.5 Centralized offset of Federal payments to collect nontax debts owed to the United States.

(a) *Scope.*

(1) This section governs the centralized offset of Federal payments to collect delinquent, nontax debts owed to Federal agencies in accordance with 31 U.S.C. 3716, 3720A and 26 U.S.C. 6402 and applicable regulations. The Department of the Treasury's Financial Management Service (FMS) administers centralized offset through the Treasury Offset Program. Offset occurs when the Federal government withholds part or all of a debtor's Federal payment to satisfy the debtor's delinquent debt owed to the government.

(2) Special rules apply to the collection of delinquent, nontax debts through the centralized offset of certain types of Federal payments, including tax refunds (31 CFR 285.2), Federal benefit payments (31 CFR 285.4), and Federal salary payments (31 CFR 285.7). While this rule applies to such payments, nothing in this rule is intended to contradict any provision of those more specific sections. To the extent any provision of this rule is inconsistent with a more specific provision of §§285.2, 285.4 or 285.7 of this part, the more specific provision shall apply.

(3) The receipt of collections pursuant to this section does not preclude a Federal agency from pursuing other debt collection remedies in conjunction with centralized offset. Nothing in this section precludes an agency from pursuing all available debt collection remedies simultaneously, provided that collections do not exceed the amount of the debt, including any interest, penalties, and administrative costs.

(b) *Definitions.* As used in this section:

Agency or *Federal agency* means a department, agency or subagency, court, court administrative office, or instrumentality in the executive, judicial, or legislative branch of the Federal Government, including government corporations.

Centralized offset means the offset of Federal payments through the Treasury Offset Program to collect debts which creditor agencies have certified pursuant to 31 U.S.C. 3716(c), 3720A(a) and applicable regulations. The term "centralized offset" includes the Treasury Offset Program's processing of offsets of Federal payments disbursed by disbursing officials other than FMS.

Creditor agency has the same meaning as found at 31 U.S.C. 3701(e)(1) and means any Federal agency that is owed a claim or debt that seeks to collect that claim or debt through offset of Federal payments.

Debt or *claim* has the meaning contained in 31 U.S.C. 3701(b) and means any amount of money,

funds, or property that has been determined by an appropriate official of the Federal government to be owed to the United States by a person, organization, or entity, except another Federal agency. The terms "debt" and "claim" are synonymous and include debt administered by a third party acting as an agent for the Federal Government. For purposes of this section, the term "debt" does not include debts arising under the Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq*), the tariff laws of the United States, or the Social Security Act (42 U.S.C. 301 *et seq.*), except to the extent provided in sections 204(f) and 1631(b)(4) of such Act (42 U.S.C. 404(f) and 1383(b)(4)(A), respectively) and 31 U.S.C. 3716(c).

Debt collection center means a Federal agency or a unit or subagency within a Federal agency that has been designated by the Secretary to collect debt owed to the United States.

Debtor means a person who owes a debt to the United States.

Delinquent or *past-due* refers to the status of a debt and means a debt has not been paid by the date specified in the agency's initial written demand for payment, or applicable agreement or instrument (including a post-delinquency payment agreement), unless other payment arrangements satisfactory to the creditor agency have been made. Nothing in this section is intended to define whether a debt is delinquent or past-due for purposes other than offset under this section.

Delinquent debt record means information about a past-due, legally enforceable debt submitted by a creditor agency to FMS for purposes of offset in accordance with the provisions of this section. Information about a past-due, legally enforceable debt includes, but is not limited to, the amount of the debt and the debtor's name, address, and taxpayer identifying number.

Disbursing official means an official who has authority to disburse public money pursuant to 31 U.S.C. 3321 or another law, including an official of the Department of the Treasury, the Department of Defense, the United States Postal Service, or any other government corporation, or any official of the United States designated by the Secretary of the Treasury to disburse public money.

FMS means the Financial Management Service, a bureau of the Department of the Treasury and its disbursing office. FMS is responsible for administering centralized offset.

Legally enforceable refers to a characteristic of a debt and means there has been a final agency determination that the debt, in the amount stated, is due, and there are no legal bars to collection by offset. Debts that are not legally enforceable for purposes of this section include, but are not limited to, debts subject to the automatic stay in bankruptcy proceedings or debts covered by a statute that prohibits collection of such debt by offset. For example, if a delinquent debt is the subject of a pending administrative review process required by

statute or regulation, and if collection action during the review process is prohibited, the debt is not considered legally enforceable for purposes of this section. Nothing in this section is intended to define whether a debt is legally enforceable for purposes other than offset under this section.

Match means the taxpayer identifying number and name (or derivative thereof) of the payee on a payment record are the same as the taxpayer identifying number and name of the debtor on a delinquent debt record.

Offset means withholding funds payable by the United States to, or held by the United States for, a person to satisfy a debt owed by the payee.

Past-due has the same meaning as "delinquent", as defined above.

Payee means a person who is due a payment from a disbursing official as certified by the payment agency. For purposes of this section, a "payee" is a person who is entitled to the benefit of all or part of a payment from a disbursing official.

Payment agency means any agency that transmits payment requests, in the form of certified payment vouchers or other similar forms, to a disbursing official for disbursement.

Payment record means information contained on a payment request, in the form of a certified payment voucher or other similar form, that has been

transmitted to a disbursing official for disbursement in accordance with the provisions of 31 U.S.C. 3325 and 3528 or other applicable law. For purposes of matching, "payment record" may include information extracted from a payment request. Such information could include, but is not limited to, the amount and type of payment and the payee's name, address, and taxpayer identifying number.

Person means an individual, corporation, partnership, association, organization, State or local government, or any other type of entity other than a Federal agency.

Recurring payment means a payment to an individual that is expected to be payable to a payee at regular intervals, at least four times annually. The term "recurring payment" does not include payments made pursuant to a Federal contract, grant or cooperative agreement.

Representative payee means a person named as payee on the payment voucher certified by the payment agency who is acting on behalf of a person entitled to receive the benefit of all or part of the payment.

Secretary means the Secretary of the Treasury.

Taxpayer identifying number means the identifying number described under section 6109 of the Internal Revenue Code of 1986 (26 U.S.C. 6109). For an individual, the taxpayer identifying number is generally the individual's social security number.

(c) *General rule.* (1) Creditor agencies shall submit delinquent debts to FMS for purposes of offset in accordance with paragraph (d) of this section.

(2) Disbursing officials shall compare payment records with delinquent debt records submitted to FMS for collection by offset. When a match occurs, and all other requirements for offset have been met, the disbursing official shall offset the payment to satisfy, in whole or part, the payee's debt to the extent allowed by law. The disbursing official shall pay any amounts not offset to the payee. *See* paragraphs (e), (f), (g), and (h) of this section.

* * *

(e) *Payments made by the United States —*

(1) *Payments eligible for offset.* Except as set forth in paragraph (e)(2) of this section, all Federal payments are eligible for offset under this section. Eligible Federal payments include, but are not limited to, Federal wage, salary, and retirement payments, vendor and expense reimbursement payments, certain benefit payments, travel advances and reimbursements, grants, fees, refunds, judgments (including those certified for payment pursuant to 31 U.S.C. 1304), tax refunds, and other payments made by Federal agencies.

(2) *Payments excluded from offset under this section.* This section does not apply to the following payments:

(i) Black Lung Part C benefit payments, or Railroad Retirement tier 2 payments;

(ii) Payments made under the tariff laws of the United States;

(iii) Veterans Affairs benefit payments to the extent such payments are exempt from offset pursuant to 38 U.S.C. 5301;

(iv) Payments made under any program administered by the Secretary of Education under title IV of the Higher Education Act of 1965 for which payments are certified by the Department of Education;

(v) Payments made under any other Federal law if offset is expressly prohibited by Federal statute;

(vi) Payments made under any program for which the Secretary has granted an exemption in accordance with the provisions of 31 U.S.C. 3716(c)(3)(B) and paragraph (e)(7) of this section; and

(vii) Federal loan payments other than travel advances.

(3) *Specific rules for certain payment types.*

(i) Specific rules apply with respect to the offset of the following types of payments:

(A) Social Security benefit payments (excluding Supplemental Security Income payments), Black Lung (part B) payments, and Railroad Retirement (other than tier 2) payments to the extent such payments are subject to offset under 31 U.S.C. 3716(c)(3)(A) (*see* 31 CFR 285.4).

* * *

(5) *Payments made to representative payees.* If a payment is made to a person solely in that person's capacity as a representative payee for another person having the beneficial interest in a payment, the disbursing official shall offset that payment only to collect debts owed by the person having the beneficial interest in the payment. Payment agencies are responsible for identifying representative payees.

SOCIAL SECURITY ADMINISTRATION
HALLEX I-1-2-91

I-1-2-91. Equal Access to Justice Act

A. Provisions

The Equal Access to Justice Act (EAJA), 5 U.S.C. 504, 28 U.S.C. 2412:

- authorizes an attorney to obtain reimbursement of expenses incurred (e.g., legal fees, expert witness fees, etc.) in the course of representing a litigant in a court action and certain administrative proceedings involving a government agency;
- stipulates that reimbursement of legal fees and other expenses applies only with respect to proceedings in which the party prevails against the agency, and only if the court finds that the position of the government was not substantially justified; and
- provides that when a representative received fees for the same work under both section 206(b) of the Social Security Act and EAJA, the representative must refund to the claimant the amount of the smaller fee.

NOTE:

If a representative is known or suspected to have collected fees under both statutes, but did not refund the smaller fee to the claimant, the representative

may be in violation of section 206(b)(2) of the Social Security Act. (See I-1-2-81, Evidence or Allegation of Violations of Law.)

B. Proceedings Before SSA Under EAJA

In its decision in *Shalala v. Schaefer*, 113 S. Ct. 2625 (1993) (see Social Security Ruling SSR 94-3c), the Supreme Court clarified the types of remands district courts may issue under § 205(g) of the Social Security Act and the procedural and substantive consequences of such remands. (Refer to I-3-1-81B. for a summary of the differences between sentence four and sentence six court remands, as defined in *Schaefer*.) One consequence is the applicability of EAJA to the remand proceedings.

1. Court Remand to the Commissioner Under Sentence Four of Section 205(g) of the Act.

The Supreme Court held that when a district court remands a case to the Commissioner under sentence four, the court cannot retain jurisdiction of the case. The Supreme Court further held that a sentence four remand is an appealable final judgment of the district court that terminates the action and makes a plaintiff a "prevailing party" for EAJA purposes. The court also clarified that, in a sentence four remand, the time period in which an EAJA petition must be filed begins at the conclusion of the appeal period following the district court's entry of a judgment, not the issuance of the administrative decision following remand.

Because the court does not retain jurisdiction of a sentence four remand, the proceedings before the Social Security Administration (SSA) on remand are not part of the court action. Accordingly, the representational services during the proceedings before SSA after the court remand under sentence four are not reimbursable under EAJA.

2. Court Remand to the Commissioner Under Sentence Six of Section 205(g) of the Act

The Supreme Court held that a sentence six remand does not terminate the litigation and that a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings. Accordingly, when a court orders a remand of a Social Security case to the Secretary (now Commissioner) and retains a continuing jurisdiction pending the Commissioner's decision on a claimant's right to benefits, the remand proceedings are an integral part of the civil action. Thus, fees for representational services during proceedings before SSA on remand under sentence six are reimbursable under EAJA, subject to other limitations in that Act.

SOCIAL SECURITY ADMINISTRATION
HALLEX I-4-1-43

I-4-1-43. Equal Access to Justice Act

The Equal Access to Justice Act (EAJA) provides that, under certain circumstances, SSA may be liable for fees and other related expenses to attorneys who prevail in court when the court finds that the Commissioner's position in the administrative proceeding was not substantially justified. When the CCPRB receives notice of an EAJA action, the staff will secure the files and the hearing transcript and give them directly to a CRA with a note indicating "EAJA Case." The CRA assembles the CAR under the usual procedures.

House Report No. 99-120(i)

P.L. 99-80,
99 Stat. 183

May 15, 1985

Dates of consideration and passage:
House June 24, 1985
Senate July 24, 1985

House Report (Judiciary Committee) No. 99-120(i), May 15, 1985 (to accompany H.R. 2378) House Report (Judiciary Committee) No. 99-120(ii), SY June 13, 1985 (to accompany H.R. 2378) Cong. Record Vol. 131 (1985). No Senate Report was submitted with this legislation. The House Report (Part i, this page, Part ii, page 151) is set out.

**132 The Committee on the judiciary, to whom was referred the Bill (H.R. 2378) to amend Section 504 of Title 5, U.S.C. and Section 2412 of Title 28, U.S.C. With respect to awards of expenses of certain agency and court proceedings, and for other purposes, having considered the same with a forum present report favorably by voice vote, thereon with an amendment and recommend that the Bill as amended do pass.

Purpose of the Bill.

H.R. 2378 extends certain provisions of the 'Equal Access to Justice Act' [FN1] which expired on September 30, 1984; makes clarifying technical and

substantive amendments; and makes the Act, as so amended, permanent. [FN2] the purpose of the 'Equal Access to Justice Act,' as originally enacted in 1980, was to expand the liability of the United States for attorneys' fees and other expenses in certain administrative proceedings and civil actions. The primary purpose of the Act was to ensure that certain individuals, partnerships, corporations, businesses, associations, or other organizations will not be deterred from seeking review of, or defending against, unjustified governmental **133 action because of the expense involved in securing the vindication of their rights. The Act reduces the disparity in resources between individuals, small businesses, and other organizations with limited resources and the federal government. The standard for recovery under the provisions of the 1980 Act is that a prevailing party, who met the eligibility requirements, would be able to recover from the United States unless the United States could show its position was substantially justified or unless special circumstances make an award unjust. [FN3]

H.R. 2378 will make permanent those provisions of the law which were originally enacted as a three-year experiment, and will provide clarification and other improvements in the Act to ensure that awards are made in appropriate proceedings and cases.

Background.

Under the American rule, attorneys' fees and related expenses are generally paid by the litigant,

regardless of whether the litigant prevails or loses an action. There are, however, the two common-law exceptions: (1) under the 'equitable trust' or 'common fund' exception a litigant whose legal action has the effect of preserving recovering a fund for the benefit of others in addition to himself or herself may be awarded attorneys' fees from the fund or the other benefiting parties; (2) the court may award fees against a losing party who has willfully disobeyed a court order or has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

Attorneys' fees may also be awarded when a statute so provides.

In 1975, after the Supreme Court's decision in Alyeska Pipeline v. Wilderness Society, [FN4] the Committee began a series of hearings to examine the availability of awards of reasonable attorneys' fees and related expenses, and the possible need to expand such awards to appropriate, prevailing parties. During the 94th Congress, the Committee conducted hearings [FN5] on the restrictive effect of the Alyeska case on the power of courts to make awards to 'private attorneys general' and on other limits on court awards, which culminated in Congress enacting a fairly narrow attorneys fee statute relating to civil rights matters. [FN6]

During the 95th [FN7] and 96th [FN8] Congresses, further hearings were conducted by the Committee primarily focusing on the limited liability**134 of the United States for attorneys' fees. These hearings culminated in the enactment of the

'Equal Access to Justice Act,' [FN9] which expanded the liability of the United States in certain administrative proceedings and civil actions.

* * *

The Bill clarifies that an EAJA award in Social Security cases is not precluded by the fee provision in the Social Security Act, 42 U.S.C. 406(b). The Bill also prohibits attorneys from collecting **136 both EAJA fees and Sec. 406(b) fees in the same case. In the situation of dual entitlement, the attorney must refund the amount of the smaller fee to the claimant.

* * *

Statement.

H.R. 2378 extends and improves the Equal Access to Justice Act, which expands the liability of the United States for attorneys fees and other expenses to certain parties who prevail against the United States in certain administrative and court proceedings. Portions of the Act expired on October 1, 1984. H.R. 2378 covers the period between that date and enactment and makes the law permanent.

The primary purpose of the Act was to increase the accessibility to justice--in administrative proceedings and civil actions--of individuals, small businesses, and other organizations.

* * *

The United States could only escape liability if (1) it demonstrated that the position of the United States was substantially justified or (2) if special circumstances would make an award unjust.

**139 Concerns have been expressed before the Committee that the provision for awards of attorneys fees could chill public officials charged with enforcing the law from vigorously discharging their responsibilities. That is not the Committee's intent. The Committee recognizes reaffirms the importance of federal enforcement of federal law, especially where a federal statute creates rights which cannot be privately enforced so that those to whom the rights have been extended are entirely dependent upon the enforcement agency to assure that their rights are protected.

* * *

Section-by-Section analysis.

Section 1

Section 1 contains six subsections. Subsection (a) amends Section 504 of Title 5 to provide that:

Whether or not the position of the United States was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

The first change made by this subsection clarifies an issue that has spawned a considerable amount of litigation. [FN19] The issue is whether the United States may be relieved of liability to pay attorney's fees and reasonable expenses merely by showing its position 'as a party' in an adversary adjudication or court proceeding was 'substantially justified.' The effect of this change coupled with the new definition of 'position of the agency ' contained in subsection (c)(4) clarify the Congressional intent that the 'position of the **140 agency' is much broader than the litigation position, and includes actions and omissions of an agency which formed the basis of the adversary adjudication. [FN20] An omission which may be relevant includes the failure of an agency or its staff to act based on a statutory, regulatory, or constitutional duty. Thus, fee awards may be made to an eligible, prevailing party unless the agency can show that its position, including the agency action which formed the basis of the adjudication, was substantially justified. These changes, including the conforming changes in Section 2 relating to civil actions, will assure that fee awards are made using the same standard in civil actions and adversary adjudications. In addition, the amendment will make clear that the Congressional intent is to provide attorneys' fees when an unjustifiable agency action forces litigation, and the agency then rides to avoid such liability by reasonable behavior during the litigation. This clarifying amendment is not meant to preclude government attorneys from asserting jurisdictional or technical defenses (e.g., statute of limitations or mootness).

Subsection (a)(2) amends Section 504 of Title 5 by striking out 'as a party to the proceeding'. The EAJA provides that 'a court (or agency) shall award to a prevailing party other than the United States, fees and other expenses...incurred by that party in any civil action brought by or against the United States...unless the court (or adjudicative officer of the agency) finds the position of the United States was substantially justified.' The term 'position of the United States (or the agency)' was not explicitly defined under the prior law, causing courts much confusion as to the proper scope of an EAJA proceeding. The Committee here defines the 'position' term in a way to clarify the EAJA, consistent with the original Congressional intent and the underlying purposes of the statute. See generally, note, 'Equal Access to Justice Act in the federal courts,' 84 Col.L.Rev. 1088, 1101-1111 (1984). The term arises in EAJA proceedings in two contexts: agency adjudications and federal court proceedings. The Committee, therefore, makes corresponding changes in 5 U.S.C. 504 and 28 U.S.C. 2412(d).

* * *

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* * *

In cases where the private party is a prevailing plaintiff, the definition of 'position of the United States (or agency)' will likely include an assessment of the agency action or failure to act that

forms the basis of the party's cause of action. The 'action or failure to act by the agency upon which the court action (or adversary adjudication) is based' does not include mere preliminary or procedural decisions of the agency which would not be subject to judicial review. Thus, in evaluating a prevailing plaintiff's EAJA petition, the court (or the adjudicative officer) will consider the agency action or failure to act that gave rise to the party's right to bring the action in a federal court (or bring the matter before the agency). The question that exactly constitutes such action will be determined by the court or administrative record of the case.

* * *

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* * *

Subsection (c)(4) provides that the 'position of the agency' includes the actions and omissions of an agency which forms the basis of the adversary adjudication. As mentioned above, the Committee, consistent with the original Act, has determined that it would be unfair to parties to administrative adjudications to be denied fees when the underlying agency action was not substantially justified.

As the Chairman of the Administrative Conference of the United States wrote:

> I strongly support your efforts to define the positions that must be substantially justified to include the underlying events that led to

> the litigation as well as the position taken in litigation. * * * The purpose of the Equal Access to Justice Act is to ensure that the cost of litigation does not prevent individuals and businesses who have been the targets of unjustified government action from opposing that action in court or agency proceedings. That purpose cannot be fully served if only the government's litigating position is considered in evaluating substantial justification, because then the government will be able to pursue actions it knows to be unreasonable or inadequately supported in the hope of intimidating the private party, knowing it can simply concede without penalty if that party chooses to fight the matter. * * * I think the extent of the potential problem has been overestimated. * * * Situations in which a real dispute arises over the government's underlying position, requiring some actual litigation of matters that would otherwise not be litigated, should be extremely **145 rare * * * by giving the judge or adjudicative officer broad discretion to restrict discovery related to fee petitions.

This subsection, coupled with subsection 2(b)(3) makes clear that the same standard shall apply to agency adjudications and court actions.

* * *

'Prevailing party,' in the case of eminent domain proceedings, means a party who obtains a

final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the government.

**147 The Committee adopted this amendment to clarify the status of condemnation actions under the Act. Condemnation actions are cases in which the United States acquires private property by eminent domain and the property owners litigate the amount to be paid as compensation. Until recently, the courts had been unanimous in holding that the Act did not apply to condemnation cases. However, two recent courts of appeals decisions [FN27] have held that EAJA does apply to condemnation cases, thus creating the need for the amendment. The amendment relating to condemnation cases has two purposes. First, it makes clear that condemnation cases are covered by the Act. Second, it provides a standard for determining who the prevailing party would be in such actions.

Under this amendment, a party would be regarded as a prevailing party when the amount it is awarded by the court lies at least halfway between the highest amount testified to on behalf of the government and the highest amount testified to on behalf of the opposing party. In other words, the prevailing party is the one whose testimony in court is closer to the award. If the award is exactly in the middle, it gives the benefit to the property owner.

This amendment applies only to values testified to in court. It would have no application to settlement negotiations or agreements. In fact, the amendment expressly denies the status of prevailing party to any party who obtains a judgment by settlement. Thus, it is presumed that any claim for expenses and fees under the Act which a party might have asserted in the event of trial would be considered by the parties in their negotiations and that an appropriate allowance, if any, would be made in the settlement amount agreed upon, so that a final judgment achieved through settlement shall foreclose thereafter the assertion of any such claim.

The Committee expects that this amendment will terminate the uncertainty which currently exists due to continuing litigation over who is the prevailing party in condemnation actions. The Committee also hopes that the amendment will result in bringing the government and the property owner closer together in their land valuations, since they would both have the extra incentive of being determined the prevailing party under the Equal Access to Justice Act.

Nothing in the definition of 'prevailing party' for purposes of condemnation proceedings is meant to limit the definition of 'prevailing party' under other circumstances. The Act, as originally enacted, has an expansive view of the term 'prevailing party'. [FN28]

* * *

**148 Section 3

Section 206(b) of the Social Security Act allows a court to authorize the payment of attorney fees not in excess of 25 percent of the total past-due benefits, and prohibits other fees. It also provides for a misdemeanor fine for persons seeking a higher amount. This provision and related ones, when read together, allow a court or the secretary to authorize payment of attorney fees and related expenses under the Equal Access to Justice Act (EAJA), notwithstanding the provisions in the Social Security Act. However, an attorney collecting attorney fees under the EAJA would have to use such fees to reduce the liability, if any remains, of the claimant for any portion of the past-due benefits. Courts and the secretary would be expected to scrutinize such awards to ensure that the attorney is reducing the liability of the claimant so that the claimant is the primary beneficiary of the EAJA award.

* * *

Section 3 amends Section 206 of the Social Security Act to provide that the existence of an attorney fee provision in the Social Security Act shall not prevent the award of fees under EAJA. In addition, Section 206(b), of the Social Security Act is amended to provide that eligibility for fees under that Act Section 206(b)(2) shall not apply but only if-- where the claimant's attorney receives fees under both the Social Security Act and the EAJA-- the attorney refunds to the claimant the amount of the smaller fee.

It is the Committee's intent that when fee awards are made in Social Security or SSI cases under the EAJA, and provision is also allowed under the Social Security Act for recovery of attorney fees of up to 25% of the claimant's benefits, that the EAJA award should be used as a set off to reduce the payment which the claimant would otherwise owe the attorney. Thus, under the amendment an attorney for a Social Security or SSI claimant would be precluded from receiving both EAJA and Social Security Act fees. Without **149 this amendment it was argued, 'double dipping' was possible. Such double payments are inappropriate and deprives the plaintiff of the benefits intended by EAJA. Because the Committee is aware of the important function served by counsel in these cases, the Committee permits the attorney to seek recovery under both authorizations. The attorney, however, may keep the larger fee, but must return the amount of the smaller fee to the claimant.

* * *

**151 Committee vote:

On May 22, 1984, H.R. 2378 was ordered Reported favorably, as amended, by the Committee on the judiciary, with a quorum present, by voice vote, with no objection being heard.

* * * *

FN1 Title ii, Public Law 96-481; 94 stat. 2325-2330; 5 U.S.C. 504 and 28 U.S.C. 2412.

FN2 portions of the Act, including 28 U.S.C. 2412(a), (b) and (c), are permanent law, and are not affected by H.R. 2378.

FN3 in a permanent provision of the Act which is unaffected by H.R. 2378-- 28 U.S.C. 2412(b)-- a court is given discretion to award reasonable attorneys' fees and other costs in addition to those costs enumerated in Section 2412(a) against the United States to the same extent that any other party-- i.e., private, public, or governmental party-- may be liable under the common law under terms of any statute which specifically provides for such an award. The provision was designed to put the United States in the same position as other parties.

FN4 Alyeska Pipeline v. Wilderness Society, 421 U.S. 240 (1975).

FN5 awarding of attorneys fees: headings before the subcommittee on courts, civil liberties and the administration of Justice of the House Committee on the judiciary, 94th Cong., 1st Sess. (1975) (hereinafter referred to as House hearings on attorneys fees, 94th Cong.).

FN6 'Civil Rights Attorneys' Fees Awards Act of 1976,' Public Law 94- 559, 42 U.S.C. 1988, 94 Stat. 2321, 2325-2330.

FN7 the awarding of attorneys fees in federal courts: hearings before the subcommittee on courts, civil liberties and the administration of justice of the House Committee on the Judiciary, 95th Cong., 1st

and 2d Sess. (1977- 78) (hereinafter House hearings on attorneys fees, 95th Cong.).

FN8 award of attorneys' fees against the federal government: hearings before the subcommittee, on courts, civil liberties and the administration of justice of the House Committee, on the judiciary, 96th Cong., 2d Sess. (1980) (hereinafter House hearings on attorneys fees, 96th Cong.).

FN9 Title ii, Public Law 96-481; 5 U.S.C. 504 and 28 U.S.C. 2412. For the legislative history of the Act, see app. 1.(b). In House hearings on attorneys fees, 96th Cong., supra note 8.

* * *

FN19 the Committee rejects the narrow interpretation explained in Spencer v. National Labor Relations board, supra, n. 14, and several other courts, and agrees with the dissent (J. Wald) contained in Del Manufacturing Company v. United States, et al., 723 F.2d 980, 986-89 (D.C.Cir. 1983).

FN20 see, discussion, infra.

* * *

FN27 United States v. 101.80 Acres of Land, 716 F.2d 714 (9th Cir. 1983; and United States v. 329.73 Acres of Land, 704 F.2d 800 (5th Cir. 1983).

FN28 see H. Rept. 1418, 96th Cong., 2d Sess. 11 (1980); and House hearings on attorneys fees, 96th Cong., supra note 8.

H.R. Rep. 99-120(i), H.R. Rep. No. 120(i), 99th Cong., 1st Sess. 1985, 1985 U.S.C.C.A.N. 132, 1985 WL 47108 (Leg.Hist.)

Social Security Handbook, Section 2019.7
http://www.socialsecurity.gov/OP_Home/handbook/handbook.20/handbook-2019.html

§2019.7 Direct Payment of Authorized Fee to a Representative

2019.7 If a Federal court rules in favor of a claimant, what fee may an attorney collect?

If a Federal court rules in your favor, the court may allow, as part of its judgment, a reasonable fee to an attorney who represented you in court. Prior to February 28, 2005, the fee allowed by the court cannot exceed 25 percent of you and your family's Title II past-due benefits resulting from the favorable judgment. Beginning February 28, 2005, the fee allowed by the court may include 25 percent of your Title XVI past-due benefits. We may certify the amount of the fee allowed by the court for payment directly to the attorney out of your past-due benefits.

In addition, if a Federal court rules in your favor, under the Equal Access to Justice Act (EAJA), your attorney may request reimbursement of the expenses he or she incurred in representing you. If the court allows a fee and the attorney is awarded a fee under EAJA, the attorney must refund to you the amount of the smaller fee.

Last Revised: Feb. 5, 2008

Social Security POMS GN 03930.040(G)

Title II - Providing Proper Notice in Claims Involving Representatives Who May Petition

G. EXAMPLE - SAMPLE LANGUAGE FOR COURT CASES

When SSA is withholding past-due benefits, the award notice must include language to advise the attorney representative of his/her options for receiving a fee. Refer to the sample language below for guidance in drafting language that covers the specific case situation. For concurrent cases, include the title XVI references given as options in the paragraphs below. Refer to paragraph C15 for past-due benefits withholding language to include with the language below, when appropriate.

1. Attorney Representative Submitted Fee Agreement on Case the Court Favorably Decided - Past-Due Benefits Payable.

* * *

Your lawyer may also petition for a fee under the Equal Access to Justice Act (EAJA). These awards are paid from administrative funds and, unlike fees under section 206 [and 1631] of the Act, are not deducted from your past-due benefits. The EAJA specifically provides that where an attorney receives fees for the same work under both section 206(b) [and 1631(d)] of the Social Security Act and

the EAJA, the attorney must refund to you the amount of the smaller fee.

* * *

3. Attorney Representative Did Not Submit Fee Agreement on Case Favorably Decided by the Court - Past-Due Benefits Payable

Your lawyer may also petition for a fee under the Equal Access to Justice Act (EAJA). These awards are paid from administrative funds and, unlike fees under section 206 [and 1631] of the Act, are not deducted from your past-due benefits. The EAJA specifically provides that where an attorney receives fees for the same work under both section 206(b) [and 1631(d)] of the Social Security Act and the EAJA, the attorney must refund to you the amount of the smaller fee.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

RITA BELL,
Plaintiff,
vs. Case No. 1:06CV0036-D-A

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,
Defendant.

DEFENDANT'S ADDITIONAL RESPONSE TO PLAINTIFF'S APPLICATION FOR ATTORNEY FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

In his recent response to Plaintiff' Application for Attorney Fees Pursuant to the Equal Access to Justice Act, Defendant agreed that the Court should award the amount requested by Plaintiff. However, Defendant objected that under the Equal Access to Justice Act, 28 U.S.C § 2412, et seq., payment of such fees should not be made directly to counsel, as was requested in her application. This objection was due to the fact that the EAJA directs that a court shall award "to *a prevailing party* other than the United States" attorney's fees and other expenses "incurred by that party in a

civil action." 28 U.S.C. § 2412(d) (1) (A) (emphasis added). However, in the intervening time since Defendants's [sic] response, Defendant Agency has changed its policy in the Fifth Circuit to be consistent with Marre [sic] v. United States, 117 F.3d 297 (5th Cir. 1997) (ruling that attorney's fees paid under Internal Revenue Code § 7430, 26 U.S.C. § 7430, belong to the prevailing party's attorneys and not the prevailing party).

Therefore, Defendant wishes to withdraw his objection that the requested EAJA fees not be made payable to Plaintiff's counsel.

Respectfully submitted,

JIM M. GREENLEE,
Miss. Bar # 5001
United States Attorney

By: /s/ JOHN E. GOUGH, JR.
JOHN E. GOUGH, JR.
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Assistant United States Attorney
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Of Counsel for the Defendant:

Frank V. Smith III, Chief Counsel, Region VII
Michael Lehr, Assistant Regional Counsel
Social Security Administration
Office of General Counsel
601 East 12th Street, Room 535
Kansas City, MO 64106

CERTIFICATE OF SERVICE

I, **John E. Gough, Jr.,** Assistant United States Attorney for the Northern District of Mississippi, hereby certify that I electronically filed the foregoing **Defendant's Additional Response To Plaintiff's Application For Attorney Fees Pursuant To The Equal Access To Justice Act** with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

Honorable Gary R. Parvin
Attorney at Law
1195 Carter Road
Coffeeville, Mississippi 38922

This the 30th day of May, 2007.

/s/JOHN E. GOUGH. JR.
JOHN E. GOUGH, JR.
Assistant United States Attorney

(seal)

SOCIAL SECURITIY
Office of the General Counsel
Region VI

September 9, 2002

Timothy M. White
Attorney at Law
Atlanta South Office Park
2530 E. 71st Street, Suite A
Tulsa, Oklahoma 74136-5577

Re: Rodney Winslow v. Commissioner
Eastern District of Arkansas
SSN: XXX-XX-3952

Dear Mr. White:

The court in the above-captioned case has ordered the Social Security Administration to pay attorney fees in the amount of $4,458.80 under the Equal Access to Justice Act (EAJA). This payment is paid by the Government and does not come from plaintiffs social security benefits. We are making payment to you in accordance with the attached order filed in the above~ captioned case on Rodney Winslow. Payment will follow shortly by check or electronic deposit. If your organization has not signed up for electronic deposit of EAJA funds and wishes to do so for future awards, you may call the appropriate contact listed below.

If payment is due for court costs related to this award, you must contact the United States Attorney's Office since *SSA* is not responsible for paying costs under the EAJA.

If you have any questions about THIS NOTICE ONLY, you may contact Linda B. Williams at (214) 767-4240. FOR ANY OTHER QUESTIONS, PLEASE CONTACT YOUR LOCAL SOCIAL SECURITY OFFICE OR CALL 1-800-SSA-1213.

Sincerely,

s/ Mark J. Kingsolver
Mark J. Kingsolver
Chief, Branch I

Enclosure

cc: U.S. Attorney's Office
Eastern District of Arkansas

1301 YOUNG STREET, SUITE 430 DALLAS, TEXAS 75202-5433

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No. 07-1468

FILED
SEP 26 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

JANET C. MANNING, PETITIONER

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

GREGORY G. GARRE
Acting Solicitor General
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QUESTION PRESENTED

Whether an "award of fees and other expenses" under the Equal Access to Justice Act, 28 U.S.C. 2412(d), is properly paid to the "prevailing party" and is subject to offset, pursuant to 31 U.S.C. 3716 (2000 & Supp. V 2005) and implementing regulations, for debt owed by the prevailing party to the United States.

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In the Supreme Court of the United States

No. 07-1468

JANET C. MANNING, PETITIONER

v.

MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-27a) is reported at 510 F.3d 1246. The opinion of the district court (Pet. App. 28a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2007. A petition for rehearing was denied on February 22, 2008 (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on May 22, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, to enable "certain prevail-

ing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States" in appropriate cases. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6 (1980). EAJA thus authorizes courts to "award to a prevailing party other than the United States fees and other expenses * * * incurred by that party" in a civil action if the position of the United States is not substantially justified and no special circumstances would make an award unjust. 28 U.S.C. 2412(d)(1)(A).

Before a court may "award [fees and other expenses] to a prevailing party," 28 U.S.C. 2412(d)(1)(A), the "party seeking [such] an award" must submit an application that, *inter alia*, "shows that the party is a prevailing party and is eligible to receive an award under [EAJA]." 28 U.S.C. 2412(d)(1)(B). The applicant for a fee award must therefore demonstrate that it falls within EAJA's definition of "party"—*i.e.*, that it is an individual or small business whose net worth when the action was filed did not exceed $2 or $7 million, respectively, or a non-profit organization meeting specific criteria. 28 U.S.C. 2412(d)(2)(B). The applicant must also document "the amount sought" by providing in its application "an itemized statement from any attorney or expert witness representing or appearing in behalf of the party." 28 U.S.C. 2412(d)(1)(B).

In civil actions for judicial review of Social Security benefit determinations, Congress has separately authorized awards of reasonable attorney fees in 42 U.S.C. 406(b). When a successful Social Security claimant "who was represented before the court by an attorney" obtains a favorable judgment, "the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the

total of the past-due benefits to which the claimant is entitled by reason of such judgment." 42 U.S.C. 406(b)(1)(A). If an attorney's fee is awarded under this provision, the Commissioner of Social Security (Commissioner) may certify the amount of such fee "for payment to such attorney out of * * * the amount of" the past-due benefits owed to the claimant. *Ibid.* In cases in which awards are made under both EAJA and Section 406(b), "the claimant's attorney must 'refun[d] to the claimant the amount of the smaller fee.'" *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 796 (2002) (quoting Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186).

b. The Department of Treasury, through the Financial Management Service, operates a centralized delinquent debt collection program known as the Treasury Offset Program. That program matches the name and taxpayer identifying number on certain federal payments with the name and taxpayer identifying number on delinquent debts that federal and state agencies have certified to Treasury as valid, delinquent, and legally enforceable. See generally 31 U.S.C. 3716 (2000 & Supp. V 2005); 31 C.F.R. 285.1-285.8. In January 2005, the Financial Management Service implemented offset of so-called "miscellaneous" payments, which include payments for EAJA awards.

2. Petitioner brought suit in district court to challenge the Commissioner's denial of supplemental security income (SSI) benefits to petitioner. The district court reversed the denial and remanded the case for further proceedings. Pet. App. 6a.

Petitioner then moved for an award of fees and other expenses under EAJA. Pet. App. 6a, 28a. Without objection from the Commissioner, the district court awarded $5958 under EAJA to petitioner as the prevail-

ing party. *Id.* at 6a. It further ordered that, if petitioner's attorney were awarded fees pursuant to 42 U.S.C. 406(b)(1), the attorney must refund the smaller of the two amounts to petitioner. Pet. App. 6a.

Petitioner's counsel subsequently received a check made payable to petitioner in the amount of $3992 with notice that $1966 had been deducted as an offset for a student-loan debt owed by petitioner to the Department of Education. Pet. App. 6a-7a. Petitioner's counsel, on his own behalf, filed a motion pursuant to Rule 60 of the Federal Rules of Civil Procedure seeking either to set aside the administrative offset or to correct what counsel perceived to be a clerical error by the district court in awarding attorney's fees to petitioner rather than to her attorney. *Id.* at 7a. The district court denied the motion, holding that no clerical error had been made and that the EAJA payment was properly made directly to petitioner based on the "clear language" of 28 U.S.C. 2412(d)(1)(A). Pet. App. 28a-33a.

3. The court of appeals affirmed. Pet. App. 4a-27a.

a. The court of appeals held that the EAJA award was properly paid to petitioner rather than to her attorney. Pet. App. 10a-24a. The court explained that EAJA's "statutory language alone makes it clear that the prevailing party and not the attorney may recover an award of attorney's fees." *Id.* at 15a. In specifying that a court "shall award to a prevailing party * * * fees and other expenses * * * incurred by that party in [the] civil action," 28 U.S.C. 2412(d)(1)(A), the court of appeals observed, EAJA's "statutory language clearly provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for an award." Pet. App. 11a-12a. That construction of the statute, the court of appeals concluded, was rein-

forced by other EAJA provisions that distinguish between a prevailing party and the litigant's attorney by requiring the party to submit an itemized statement from its attorney, "treat[ing] attorneys in the same manner as" expert witnesses and other persons found to be "needed to prepare the case," and conditioning eligibility for an award on the net worth of the "prevailing party, not the attorney." *Id.* at 14a; cf. *id.* at 17a (noting "settled law that the attorney does not have standing to apply for the EAJA fees" because "that right belongs to the prevailing party").

The court of appeals further found EAJA's legislative history to be consistent with the statute's unambiguous text because that history "clearly states that the fees are for the claimant." Pet. App. 15a (citing H.R. Rep. No. 1418, *supra*, at 5-6). The court explained that Congress intended EAJA "to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." *Id.* at 16a (quoting *Commissioner, INS* v. *Jean*, 496 U.S. 154, 163 (1990)). The court therefore rejected the notion that the statute was "enacted for the benefit of counsel to ensure that counsel gets paid." *Ibid.*

The court of appeals found additional support for its holding in related statutory contexts. Noting that legal principles developed in "cases addressing other fee-shifting statutes, such as [42 U.S.C.] § 1988," apply in the EAJA context, Pet. App. 13a n.5, the court found it significant that this Court has "rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff." *Id.* at 12a-13a (quoting *Venegas* v. *Mitchell*, 495 U.S. 82, 89 (1990), and citing *Evans* v. *Jeff D.*, 475 U.S. 717 (1986)). Similarly, it found that Section 406(b)(1), unlike EAJA, "expressly

provides for payment to the attorney," demonstrating that "Congress knows what language to use to award attorney's fees to an attorney." *Id.* at 16a-17a. The court of appeals observed that "Congress could have worded the EAJA statute [similarly], but it did not do so." *Id.* at 17a.

b. The court of appeals held that, because the EAJA award was payable to petitioner rather than to her attorney, the award was subject to offset to collect petitioner's pre-existing debt to the United States. Pet. App. 24a-26a. The court explained that, under the Financial Management Service regulations implementing 31 U.S.C. 3716, all federal payments are subject to offset unless they are specifically exempted from the offset mechanism. Pet. App. 25a. The court observed that EAJA does not prohibit the offset of fees and expenses awarded under the statute, and that neither Section 3716 nor the regulations implementing that provision exempt EAJA awards from offset. *Ibid.*

ARGUMENT

The court of appeals correctly held that EAJA awards of fees and other expenses are properly paid to the prevailing party rather than to the attorney representing that party, and that such awards may be reduced to offset debt owed by the prevailing party to the government. Although a recent decision by the Eighth Circuit has created a division of authority on the question presented, the Acting Solicitor General has authorized en banc rehearing in the that case. In the government's view, review by this Court would be premature at the present time.

1. a. EAJA's text compels the conclusion that an award of fees and expenses under the statute is paid to the

prevailing party and not to her attorney. EAJA provides that, in circumstances where an award is appropriate and "[e]xcept as otherwise specifically provided by statute, a court shall award *to* a *prevailing party* * * * fees and other expenses * * * *incurred by that party*." 28 U.S.C. 2412(d)(1)(A) (emphases added). This Court recently explained that the same language in EAJA's provision governing administrative proceedings emphasizes party status and "leaves no doubt" that Congress intended that EAJA awards be determined from "the perspective of the litigant" and not from the perspective of her attorney. *Richlin Sec. Serv. Co.* v. *Chertoff*, 128 S. Ct. 2007, 2013 (2008). In an analysis that mirrors this Court's reasoning in *Richlin*, the court of appeals in this case concluded that equivalent language in Section 2412(d) "provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for an award of attorney's fees." Pet. App. 12a. All but one of the courts of appeals to have addressed this question are in accord.[1]

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[1] See, *e.g.*, *Reeves* v. *Astrue*, 526 F.3d 732, 735 (11th Cir. 2008) (EAJA's "explicit reference to the 'prevailing party' unambiguously directs the award of attorney's fees to the party who incurred those fees and not to the party's attorney."), petition for cert. pending, No. 08-5605 (filed Aug. 1, 2008); *FDL Techs., Inc.* v. *United States*, 967 F.2d 1578, 1580 (Fed. Cir. 1992) (EAJA specifies that "the prevailing party, and not its attorney, is entitled to receive the fee award."). But see *Ratliff* v. *Astrue*, No. 07-2317, 2008 WL 4093013, at *1-*2 (8th Cir. Sept. 5, 2008) (holding that "EAJA fee awards become the property of the prevailing party's attorney"); pp. 13, 14-15, *infra*. The question whether an EAJA award belongs to a Social Security claimant or his attorney is currently pending in *Stephens* v. *Astrue*, No. 08-1527 (4th Cir. filed May 7, 2008). Although the Sixth Circuit has issued an unpublished decision addressing the issue, see *King* v. *Commissioner of Soc. Sec.*, 230 Fed. Appx. 476, 481 (6th Cir. 2007) (stating that "attorney's fees awarded

Other provisions of EAJA confirm that a litigant's attorney is not the recipient of an EAJA award. For instance, an EAJA award is conditioned on the prevailing party's ability to demonstrate that her own net worth, not that of her attorney, satisfies EAJA's restrictions. See 28 U.S.C. 2412(d)(2)(B) (defining "party"). More generally, an EAJA applicant must show that "the party" rather than her attorney "is eligible *to receive* an award under [EAJA]." 28 U.S.C. 2412(d)(1)(B) (emphasis added).

As the court of appeals explained, moreover, EAJA treats attorneys in the same manner as it treats expert witnesses, engineers, scientists, analysts, and other persons found by the court to be necessary to prepare the case. See Pet. App. 14a; 28 U.S.C. 2412(d)(2)(A) ("fees and other expenses" include "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees"). Nothing in the statute suggests that Congress intended that "all [such] persons performing services for the prevailing party in the litigation" might separately "assert their claims for compensation" against the government under EAJA. See *Panola Land Buying Ass'n* v. *Clark*, 844

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under the EAJA are payable to the attorney; they are awarded for the benefit of the party, but the money is not the party's to keep"), that decision is not binding precedent in and will not necessarily be followed by the Sixth Circuit in light of its tension with other Sixth Circuit precedent. See *Williamson* v. *Aetna Life. Ins. Co.*, 481 F.3d 369, 376 n.4 (6th Cir.), cert. denied, 128 S. Ct. 671 (2007); cf., *e.g.*, *Drennan* v. *General Motors Corp.*, 977 F.2d 246, 254 (6th Cir. 1992) ("ERISA's fee-shifting section, like section 1988, provides that the party, not the attorney, is eligible for and receives the statutory award," which "the party [may] negotiate, waive, or settle."), cert. denied, 508 U.S. 940 (1993).

F.2d 1506, 1511 (11th Cir. 1988). Rather, those professionals—including attorneys—must obtain their compensation from the party who utilized their services. *Ibid.*; see *Oguachuba* v. *INS*, 706 F.2d 93, 97-98 (2d Cir. 1983).

Had Congress intended for EAJA awards to be payable directly to the attorneys who provided the relevant services, it presumably would have utilized language similar to that in 42 U.S.C. 406(b), which was enacted before EAJA and authorizes the Commissioner to make direct "payment to [the prevailing party's] attorney out of * * * the amount of [the] past-due benefits" awarded to that party by a court. 42 U.S.C. 406(b)(1)(A). Congress did not do so, and its decision reflects sound policy. In many EAJA contexts, a party may pay some or all of her attorney's bills during the course of litigation; an attorney may owe its client for an unrelated debt; or the party and her attorney may dispute the appropriate amount of professional fees owed under their fee agreement.[2] By making EAJA awards payable to the prevailing party, Congress avoided the need to provide for resolution of such issues under EAJA itself. Rather, disputes between EAJA award recipients and their attorneys concerning their respective obligations to each other are resolved under applicable non-EAJA law.

Finally, this Court's decisions construing 42 U.S.C. 1988 support the court of appeals' decision. The Court has explained that Section 1988, by providing that courts

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[2] Fee relationships in Social-Security-benefit cases are different than in other EAJA contexts because of statutory provisions prohibiting attorneys from collecting or demanding from their clients anything more than the authorized allocation of past-due benefits awarded by a court. See *Gisbrecht* v. *Barnhart*, 535 U.S. 789, 795-796 (2002) (discussing 42 U.S.C. 406(a)(5) and (b)(2)).

"may allow the prevailing party * * * a reasonable attorney's fee as part of the costs," 42 U.S.C. 1988(b), makes "the party, rather than the lawyer," eligible for fee awards. *Venegas* v. *Mitchell*, 495 U.S. 82, 87 (1990). This Court has therefore "rejected the argument that the entitlement to a § 1988 award belongs to the attorney rather than the plaintiff," *id.* at 89 (citing *Evans* v. *Jeff D.*, 475 U.S. 717, 731-732 (1986)), holding instead that a plaintiff may use a potential fee award as a "bargaining chip" that she can waive, settle, or negotiate away to obtain other benefits for herself. *Jeff D.*, 475 U.S. at 731 & n.20; see *Venegas*, 495 U.S. at 88. This Court has construed fee-shifting provisions similarly in analogous contexts, see Pet. 13a n.5 (citing cases), and it would be anomalous to do otherwise here, particularly given the additional textual indications in EAJA (see pp. 6-9, *supra*) that Congress intended EAJA fees and expenses to be paid to the prevailing party.

b. The court of appeals was also correct in holding (see Pet. App. 24a-26a) that the EAJA award in this case, like most federal payments, was subject to an administrative offset for the pre-existing debt that petitioner owed to the United States. As the court explained, "[a]ll federal payments, including 'fees,' are subject to administrative offset," except for payments that are specifically listed as exceptions to that general rule. *Id.* at 25a (citing 31 ~~C.F.R.~~ 285.5(e)(1) and (2)). Neither EAJA itself, nor the statutory and regulatory provisions governing the administrative-offset process, exempt the fee award in this case from the offset mechanism. See *ibid.* Thus, because the EAJA award was properly payable to petitioner rather than to her attorney, it was subject to offset to collect the separate debt that petitioner owed to the United States.

c. Petitioner contends (Pet. 23) that allowing offset in the circumstances presented here will impair the achievement of EAJA's purpose, as described in its legislative history, because Social Security claimants who owe pre-existing debts to the government will find it difficult to obtain legal representation. That claim lacks merit. Given EAJA's "straightforward statutory command" that courts are to award attorney's fees to the prevailing party, as well as the absence of any exception for EAJA awards to the general rules governing the Treasury Offset Program, "there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). In any event, the legislative history supports the plain meaning of EAJA's text. In authorizing "certain prevailing parties to recover an award of attorney fees * * * and other expenses against the United States," H.R. Rep. No. 1418, *supra*, at 5-8, Congress sought to "eliminate for the average person the financial disincentive to challenge unreasonable governmental actions," *Commissioner, INS* v. *Jean*, 496 U.S. 154, 163 (1990), not to further the financial interests of the attorney who provides the representation. See *Panola*, 844 F.2d at 1511 (explaining that "such fee provisions were [not] enacted for the benefit of the Bar"). And while petitioner suggests (Pet. 17, 23, 25) that awarding the fee to the prevailing party would diminish a plaintiff's ability to obtain counsel, the court of appeals rightly found that contention "purely speculative." Pet. App. 22a; see *Jeff D.*, 475 U.S. at 742 n.34 (noting that "the likelihood of this circumstance arising is remote" under Section 1988).

2. Petitioner contends (Pet. 9-16) that the decision in this case conflicts with decisions of numerous courts of appeals. That contention is greatly exaggerated. See

p. 7 n.1, *supra*. Most of the decisions on which petitioner relies either involve fee-shifting statutes other than EAJA that do not use EAJA's "prevailing party" formulation;[3] are limited to the specific fee provision involved;[4] are older rulings reflecting rationales subsequently undermined by *Jeff D.* and *Venegas*;[5] are unpublished and therefore without precedential value; or are otherwise distinguishable.[6]

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[3] See, *e.g.*, *United States ex rel. Virani* v. *Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 577-579 (9th Cir. 1996) (False Claims Act), cert. denied, 519 U.S. 1109 (1997); *Plant* v. *Blazer Fin. Servs., Inc.*, 598 F.2d 1357, 1365 (5th Cir. 1979) (Truth in Lending Act); *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1244-1245 (3d Cir. 1977) (stating that "fee awards must accrue to counsel" under Age Discrimination in Employment Act, which requires court to "allow a reasonable attorney's fee to be paid by the defendant" when judgment is entered for the plaintiff), cert. denied, 436 U.S. 913 (1978); cf. *Jeff D.*, 475 U.S. at 730 n.19 (acknowledging that courts have treated fee awards under Truth in Lending Act differently; citing decision following *Plant*); *Gilbrook* v. *City of Westminster*, 177 F.3d 839, 872-875 (9th Cir.) (declining to extend *Virani* to fees awarded to "prevailing party" under Section 1988), cert. denied, 528 U.S. 1061 (1999).

[4] See, *e.g.*, *Willis* v. *GAO*, 448 F.3d 1341, 1347 & n.3 (Fed. Cir. 2006) (addressing fee under Civil Service Reform Act and recognizing that "the client rather than the attorney has the right to collect fees awarded under [EAJA]"), cert. denied, 127 S. Ct. 1356 (2007).

[5] See, *e.g.*, *Dennis* v. *Chang*, 611 F.2d 1302, 1309 (9th Cir. 1980) (dicta stating that Section 1988 fee "award should be made to the organization that provided [pro bono] legal services" to "avoid a windfall" to the plaintiff); *Hairston* v. *R&R Apartments*, 510 F.2d 1090, 1093 (7th Cir. 1975) (similar for Fair Housing Act fees); cf. *Jeff D.*, 475 U.S. at 721-722, 730-732 (litigant represented by pro bono counsel may waive statutory attorney fees under Section 1988 to secure more favorable settlement).

[6] See, *e.g.*, *Turner* v. *Secretary of the Air Force*, 944 F.2d 804, 808 & n.4 (11th Cir. 1991) (stating that "it is clear that the award of attorneys' fees [under Title VII] belongs to the prevailing party, not to the attor-

After the petition for a writ of certiorari was filed in this case, however, the Eighth Circuit held that "EAJA fee awards become the property of the prevailing party's attorney when assessed and may not be used to offset the plaintiff's debt." *Ratliff* v. *Astrue*, No. 07-2317, 2008 WL 4093013, at *2 (8th Cir. Sept. 5, 2008). The *Ratliff* panel acknowledged that its holding conflicted with decisions of several courts of appeals (including the decision in this case), and explained that, while it otherwise might "well agree with [its] sister circuits and be persuaded by a literal interpretation" of EAJA's text, it felt constrained by Eighth Circuit precedent to hold the challenged offset to be impermissible. *Id.* at *1-*2. Judge Gruender concurred but wrote "separately to emphasize that [the court's] holding today, as compelled by [circuit precedent], is inconsistent with language in two Supreme Court opinions, the EAJA's plain language, and the holdings of most other circuit courts." *Id.* at *3 (discussing *Jeff D.* and *Venegas*).

In addition, the Fifth Circuit has held that, although a fee award under 26 U.S.C. 7430 is made to a "prevailing party," that statutory directive "is not controlling" for purposes of administrative offsets because "the real part[ies] in interest vis-a-vis attorneys' fees awarded under the statute are the attorneys themselves," such

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ney representing the party," while noting in dicta that fee may sometimes be "distributed directly to the attorney" where doing so is most practical); *Richardson* v. *Penfold*, 900 F.2d 116, 117 (7th Cir. 1990) (explaining that "award of attorney's fees under section 1988 is to the party, not to his lawyer," while noting in dicta that courts commonly make the "award directly to the lawyer where * * * the lawyer's contractual entitlement is uncontested"); *Cornella* v. *Schweiker*, 728 F.2d 978, 981, 986-987 (8th Cir. 1984) ("prevailing party may obtain attorneys' fees" under EAJA if represented by pro bono counsel).

that "the prevailing party is only nominally the person who receives the award." *Marré* v. *United States*, 117 F.3d 297, 304 (5th Cir. 1997). Concluding that "the fee once awarded becomes in effect an asset of the attorney," the court held that the government could not offset a federal debt owed by the prevailing party from fees awarded under Section 7430. *Id.* at 304-305 & n.11. Although *Marré* does not squarely conflict with the decision below because the two cases involved different fee-shifting statutes, Section 7430 was largely modeled on EAJA and expressly incorporates EAJA's definitions of "party" and "prevailing party." See 26 U.S.C. 7430(a); see also 26 U.S.C. 7430(c)(4) (defining the term "prevailing party" by referencing 28 U.S.C. 2412(d)(1)(B) and (2)(B)). In its administration of the Treasury Offset Program, the government has therefore treated *Marré* as precluding use of the offset mechanism against EAJA awards in cases within the Fifth Circuit.

The decisions in *Ratliff* and *Marré* create the potential for disuniformity in the application of the Treasury Offset Program to EAJA awards in Social Security cases. In the government's view, however, the question presented does not warrant review by this Court at the present time.[7] The Acting Solicitor General has authorized the filing of a petition for rehearing en banc in *Ratliff*, and the en banc Eighth Circuit of course would not be bound by the prior circuit precedents that the *Ratliff* panel and the concurring judge deemed to be controlling. If the Eighth Circuit grants rehearing en banc and approves the offset at issue in that case, its

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[7] The petition for a writ of certiorari in *Reeves* v. *Astrue*, No. 08-5605 (filed Aug. 1, 2008), presents substantially the same question as is presented in this case. The Court may therefore wish to consider the petitions together.

decision will eliminate the current circuit conflict on the question whether EAJA awards are subject to administrative offset to collect pre-existing debts owed by prevailing parties.

Although the Fifth Circuit's decision in *Marré* is in substantial tension with the ruling below, the two decisions do not squarely conflict because the cases involved different fee-shifting statutes. And if the Eighth Circuit grants rehearing en banc in *Ratliff* and a sufficient consensus ultimately develops among the other courts of appeals, the Fifth Circuit may be willing at a later date to reconsider its decision in *Marré*. In light of those considerations, review by this Court would be premature at the present time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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